JD(SF)–34–11
Honolulu, HI

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

HTH CORPORATION, PACIFIC BEACH CORPORATION, and KOA MANAGEMENT, LLC, a SINGLE EMPLOYER, d/b/a PACIFIC BEACH HOTEL,
Respondent,

and

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 142
Union

Cases 37-CA-7965
37-CA-8064
37-CA-8094
37-CA-8096
37-CA-8097
37-CA-8112
37-CA-8113
37-CA-8145

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for the Acting General Counsel.
Dave K. Mori, Oahu Division Director,
ILWU, L-142 for the Charging Party,
Wesley M Fujimoto, Esq. and *Ryan E. Sanada, Esq.*
(Imanaka Kudo & Fujimoto) for the Respondent.

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DECISION

STATEMENT OF THE CASE

JOHN J. MCCARRICK, Administrative Law Judge: This case was tried in Honolulu, Hawaii on 16 days between February 16, 2011 and April 28, 2011. The complaint in case 37-CA-8097, as amended, issued on November 29, 2010 and the consolidated complaint, as amended, in cases 37-CA-7965 et al., issued on January 28, 2011, by the Regional Director for Region 20.

On April 4, 2011, given the common issues of fact and law, the common parties, and in order to avoid conflicting decisions and for the sake of judicial economy, without objection I consolidated the complaint in case 37-CA-8097 with the consolidated complaint in cases 37-CA-7965 et al.

The complaint in case 37-CA-8097 alleges that HTH Corporation, Pacific Beach Corporation, and KOA Management, LLC, a single employer, d/b/a Pacific Beach Hotel, (Respondent) violated Section 8(a)(1) and (3) of the Act by issuing verbal warnings to its employee Rhandy Villanueva, by suspending and by terminating Villanueva.

The consolidated complaint in cases 37-CA-7965 et al., as amended[1], alleges that Respondent violated Section 8(a)(1) of the Act by engaging in surveillance of employees' union activities and by announcing to employees that Union representatives Dave Mori and Carmelita Labtingao were prohibited from entering Respondent's property.

The consolidated complaint in cases 37-CA-7965 et al. also alleges that Respondent violated Section 8(a)(1) and (5) of the Act by ceasing to match employee contributions to its 401(k) plan, by banning union representatives Dave Mori and Carmelita Labtingao from Respondent's facility, by failing to furnish and unreasonably delaying in furnishing information to the Union necessary and relevant to the Union's performance of its duties as exclusive collective bargaining representative, and by unilaterally changing terms and conditions of employment without providing the Union notice and an opportunity to bargain with respect to the alleged changes.

Respondent filed timely answers to both the complaint and consolidated complaint stating it had committed no wrongdoing.

FINDINGS OF FACT

Upon the entire record herein, including the briefs from the Counsel for the Acting General Counsel (CGC) and Respondent, I make the following findings of fact.

I. JURISDICTION

Respondent in its answers admitted that HTH Corporation is a Hawaii corporation with headquarters in Honolulu, Hawaii, that Pacific Beach Corporation is a Hawaii corporation with

[1] At the hearing Counsel for the General Counsel moved to amend the consolidated complaint to remove paragraphs 11(a)(4) and 11(d). There being no objection, the motion was granted.

headquarters in Honolulu, Hawaii, that Pacific Beach Corporation is the sole member of Koa Management, admitted that Pacific Beach Corporation has been engaged in the business of operating the Pacific Beach Hotel, providing food and lodging in Honolulu, Hawaii and that Pacific Beach Corporation in operating the Pacific Beach Hotel annually earned in excess of $500,000 and purchased and received at the Pacific Beach Hotel products, goods and material valued in excess of $5,000 which originated from points outside the State of Hawaii.

Respondent denied Koa management is a Delaware limited liability company or that it received revenues from the Pacific Beach Hotel. Respondent denied that HTH Corporation, Pacific Beach Corporation, or Koa Management have been affiliated business enterprises with common officers, ownership directors, management and supervision, have a common labor policy, have shared facilities or have held themselves out to the public as a single integrated business enterprise. Respondent denied that HTH Corporation, Pacific Beach Corporation, or Koa Management constitute a single integrated business enterprise and a single employer.

At the hearing the parties stipulated[2] that the single employer allegation herein was litigated by the parties in cases 37-CA-7311 et al. before Administrative Law Judge James Kennedy and that the parties would refer to the transcript of that proceeding to determine the single employer issue, herein. In his decision Judge Kennedy found that the three entities in his case and herein constitute a single employer.

Following the close of the hearing herein, the Board affirmed Judge Kennedy's decision in *HTH Corporation d/b/a Pacific Beach Hotel*, 356 NLRB No. 182 (June 14, 2011), herein called HTH I. In HTH I at 5, the Board found that:

> Respondents HTH Corporation, Pacific Beach Corporation and Koa Management, LLC, together doing business as Pacific Beach Hotel, constitute a single employer engaged in commerce and in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

I will only give a brief history of the management structure at the Pacific Beach Hotel, (herein the hotel) as that has been extensively detailed previously by both the Board in HGH I and Judge Kennedy. Since at least 2002, the various enterprises herein were operated by Herbert T. Hayashi. Much of the hotel's business has come from Japan where Herbert Hayashi's nephew John Hayashi serves as the hotel's agent. Herbert died in 2005, leaving his share of the business to his daughter Corine Hayashi. Ms. Hayashi has since married and her last name is now Watanabe. Since about December 2003, Robert M. ("Mick") Minicola has been employed by both HTH and Pacific Beach Corporation. Minicola was hired as regional general manager, to oversee the King Kamehameha Kona Beach Hotel, the Pagoda Hotel and Floating Restaurant, as well as the Pacific Beach Hotel. Later, Minicola became the regional vice president of operations for both Pacific Beach Corporation and HTH. He reports to Corine Watanabe. She is the chief executive officer, though she is corporate vice president for both HTH and Pacific Beach Corporation. Watanabe did not testify in either this matter or Judge Kennedy's case. Christine Ko was Respondent's director of housekeeping, Charlene Lam was Respondent's housekeeping manager, Roselind Mad was Respondent's housekeeping clerk, Eric Hangai was Respondent's security director, Charles Sayles was Respondent's restaurant operations manager and Margaret Yang was Respondent's recruiting and training manager. Ko did not testify in this case.

[2] Jt. Exh. 1.

Since there has been virtually no change in the labor relations policies, ownership or the management structure of Respondents[3] since the trial before Judge Kennedy or the Board's decision in HGH I, I conclude that HTH, PBC and Koa (Respondent herein) continue to constitute a single employer[4] and are engaged in commerce within the meaning of the Act.

II. LABOR ORGANIZATION

Respondent admitted, the Board has found and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Respondent's History with the Board

Respondent herein operates the Pacific Beach Hotel, the hotel, on Waikiki Beach in Honolulu, Hawaii. The hotel consists of two towers, the Ocean and Beach Towers bordered by Liliuokulani and Kalaaua, Kuhio and Kealohilani Avenues. Respondent also operates the Oceanarium Restaurant in the Hotel. There is a parking structure attached to the hotel that can be accessed from both Kuhio and Liliuokulani and Kalakaua Avenues. The entrances to the parking structure have been the site of many Union handbilling activities directed at Respondent.

This case is yet a further chapter in Respondent's attempt to impede the rights of employees of the Pacific Beach Hotel to select and be represented by International Longshore and Warehouse Union, Local 142 (the Union). The Union's organizing drive was begun in 2002. The first NLRB election was conducted on July 31, 2002 and was overturned by the Board based on coercive interrogation of employees and maintenance of an overly broad no-solicitation rule by Respondent HTH Corporation. *Pacific Beach Corporation*, 342 NLRB 372 (2004). A second election was conducted on August 24, 2004. Among other things, the second election involved challenged ballots in a sufficient number to affect the outcome. The Board in *Pacific Beach Corporation*, 344 NLRB 148 (2005) ruled Respondent interfered with employee free choice in the 2004 rerun election by granting employees promotions and raises during the critical period. The Board directed that first, certain challenged ballots should be opened and counted, and second, in the event the revised tally resulted in a majority favoring union representation, a certification of representative was to be issued; if it did not, the Union's objections were to be sustained, and a third election conducted. The ballots were opened, counted, and a revised tally issued showing that the Union had won by one vote. Accordingly, on August 15, 2005, the Regional Director issued a certificate of representative in favor of the Union in the following unit:

> All full-time, regular part-time, and regular on call concierge, concierge II, concierge II night auditor, guest service agent I, guest service II, room control clerk, bell help, door attendant, head door attendant, senior bell sergeant, working bell captain, parking attendant, parking valet, FIT reservation clerk, FIT reservation clerk I, FIT reservation clerk II, junior reservation clerk, senior FIT reservation, to senior reservation clerk, housekeeper IA, housekeeping clerk, quality control, housekeeper I, housekeeper II, housekeeper III, laundry attendant I, seamstress, bushelp, waithelp, banquet bus help, head banquet captain, banquet captain, head banquet porter, assistant head banquet

[3] Joint Exh. 1.

[4] Central Mack Sales, 273 NLRB 1268, 1271-1272 (1984).

porter, banquet porter, banquet wait help, purchasing clerk, senior store keeper, butcher, cook I, cook II, cook III, cook IV, pantry, pantry I, pantry II, head buffet runner, buffet foodrunner, head steward, utility steward, cafeteria server, Aloha Center attendant, relief assistant manager (Oceanarium Restaurant), head banquet bartender, banquet bartender, head bartender, assistant head bartender, bartender, pastry cook I, pastry cook II, pastry cook III, food and beverage audit income, night auditor, data processing clerk, senior costs control clerk, food and beverage cashier, network support specialist, diver level I, diver level II, diver level III, diver level IV, PBX operator, lead operator, maintenance 2nd, maintenance 1st, mechanic foreman, assistant/general maintenance, maintenance trainee, senior maintenance trainee, maintenance utility, assistant gardener, assistant head gardener and gardener employed at the Pacific Beach Hotel, located at 2490, Kalakaua Avenue, Honolulu, Hawaii, but excluding the president, the corporate general manager, corporate director of hotel operations, director of human resources, director of finance, director of sales and marcom (sic) [marketing], director of revenue management, director of Far East Sales, director of food and beverage, director of facilities management, Pacific Beach Hotel director of front office services, director of IT, corporate controller, operations controller, financial controller, head cashiers (food and beverage), executive housekeeper, assistant executive housekeeper, restaurant managers, banquet managers, sous chefs, chief steward/stewards managers, Aloha Coffee Shop Manager, income auditor manager, sales administrative assistant, PBC FE/concierge, chief engineer, landscaping manager, and the accounts receivable manager, managers, assistant managers, administrative assistant to the director of sales and marketing, purchasing agent employees, confidential employees, guards and/or watchpersons and supervisors as defined in the Act.

It should be noted that the employer to whom the certification ran was HTH.

Respondent and the Union bargained between November 2005 and December 4, 2006. On January 1, 2007 PBHM, who the Board found is an agent of Respondent, pursuant to an agreement with Koa Management began operating the hotel and bargaining with the Union. In early August 2007 Minicola notified PBHM that it was canceling the management agreement effective December 1, 2007, PBHM changed its bargaining team. As a result, PBHM and the Union memorialized a number of the tentative agreements which they had reached. It also established a daily housekeeping limitation providing that housekeepers would be assigned 16 rooms per day in the Ocean Tower and 15 rooms per day in the Beach Tower.

As of January 1, 2008 Respondent refused to recognize or bargain with the Union.

Pursuant to a complaint issued by the Regional Director for Region 20 on September 30, 2008 in HTH Corporation, Pacific Beach Corporation and Koa Management, LLC, a single employer, d/b/a Pacific Beach Hotel, cases 37-CA- 7311 et al., Judge Kennedy conducted a hearing and issued his decision on September 30, 2009. JD(SF)-35-09.

Meanwhile, on January 7, 2010, the Regional Director for Region 20 filed a petition with the United States District Court for the District of Hawaii. (CIV. NO. 10-00014JMS/LEK) seeking injunctive relief pursuant to section 10(j) of the Act against HTH Corporation, Pacific Beach Corporation and Koa Management, LLC, a single employer, d/b/a Pacific Beach Hotel. On March 29, 2010, United States District Court Judge Michael Seabright granted the Region's petition for injunctive relief and ordered Respondent, inter alia, to cease withdrawing recognition from the Union, cease refusing to bargain in good faith with the Union, unilaterally changing terms and conditions of employment without giving notice to and bargaining with the Union. Judge Seabright also ordered Respondent to resume contract negotiations and honor all

tentative agreement entered into from the point Respondent and the Union, and PBHM and the Union, left off negotiations on November 30, 2007, . . . provided, however, that the parties may in good faith reopen negotiations on any tentative agreement that has been validly affected by a change in economic or other circumstances; and to reinstate Ruben Bumanglag, Darryl Miyashiro, Virginia Recaido, Virbina Revamonte and Rhandy Villanueva to their former job positions. 699 Fed. Supp 2d 1176 (Dist of Hawaii 2010).

As noted above, Judge Kennedy's decision was affirmed by the Board at 356 NLRB No 182 (2011).The Board at 5-6 found Respondent violated Section 8(a)(1) of the Act by promulgating overbroad rules, by polling employees concerning their union activities, by threatening employees for being assertive during the collective bargaining process, and by threatening employees with the loss of their jobs if the Hotel had to close because of union boycotts.

The Board found Respondent violated Section 8(a)(3) and (1) of the Act by discharging employees Keith Kapena Kanaiaupuni, Darryl Miyashiro, Todd Hatanaka, Rhandy Villanueva, Virginia Recaido, Ruben Bumanglag, and Virbina Revamonte because of their union activities.

The Board found Respondent engaged in a litany of violations of Section 8(a)(5) and (1) of the Act by bargaining with the Union with no intention of reaching an agreement, by using PBHM as a middleman as part of a scheme to disguise their decision to deprive the employees of union representation and to escape their obligation to collectively bargain in good faith, by withdrawing recognition of the Union as the Section 9(a) representative of the unit employees, by unilaterally and without bargaining with the Union promulgating rules through employment offers and/or the issuance of a new employee handbook, by unilaterally and without bargaining with the Union changing housekeepers' workloads by adding 2 additional rooms to clean per day, from 16 to 18 rooms per day in the Ocean Tower and from 15 to 17 in the Beach Tower, by unilaterally and without bargaining with the Union imposing new conditions of employment on their employees, including requiring them to apply for their own jobs and treating them as new employees, requiring drug tests, and imposing a 90-day probationary period, by unilaterally and without bargaining with the Union closing the Shogun Restaurant and discharging an undetermined number of employees who worked in that restaurant, by unilaterally and without bargaining with the Union laying off Hotel employees, by discharging employees Keith Kapena Kanaiaupuni, Darryl Miyashiro, Todd Hatanaka, Rhandy Villanueva, Virginia Recaido, Ruben Bumanglag, and Virbina Revamonte the without bargaining with the Union, by unilaterally and without bargaining with the Union reassigning certain employees to different positions and unilaterally lowering their wages, by unilaterally and without bargaining with the Union implementing wage increases for both tipping and non tipping category employees, and by refusing to provide relevant and necessary information to the Union concerning the legal relationship between PBHM and the Respondent, information concerning the management agreement between PBHM and the Respondent, and information concerning the Respondent's resumption of management of the Hotel and changes to unit employees' terms and conditions of employment that the Respondent wished to effect after they resumed management of the Hotel.

B. Case 37-CA-8097

1. The Written Warning to Villanueva

In this case in complaint paragraph 6(a) General Counsel alleges that Respondent issued a written warning to Villanueva because of his union activity.

The Board found in *HTH I,* that Villanueva was terminated unlawfully because of his Union activities in December 2007. He was reinstated pursuant to Judge Seabright's Order on April 12, 2010**.** Villanueva worked in the housekeeping department as a houseman. He had been employed by the Hotel for over 14 years. As a houseman, Villanueva performed a variety of tasks in support of the housekeeping staff, assisting with room cleaning as called upon, hallway and public area custodial work, and as a runner providing services (such as delivering rollaway beds) to Hotel guests. He was classified for payroll purposes as a Housekeeper II. Villanueva was selected by the housekeeping staff to be one of its representatives on the Union's negotiating committee. He served continuously on that committee from its inception in 2005 through the changeover in December, 2007. During that time frame he missed only two bargaining sessions. He often sat directly across the table from Minicola. In addition, he manned the Union's information booth on Kuhio Avenue behind the Hotel. On one occasion he noticed Minicola observing him as he attended rallies in front of the Hotel. Villanueva was terminated on November 30, 2007 pursuant to the Pacific Beach Corporation again taking operational control of the Hotel from PBHM. The Board agreed with Judge Kennedy that the only conclusion that can be reasonably drawn is that Respondent chose not to recall Villanueva because of his union activism, including his long participation as a member of the Union's negotiating committee.

Pursuant to District Court Judge Seabright's March 29, 2010 order, Respondent reinstated Villanueva in April 2010. During Villanueva's 28-month hiatus working for Respondent, he was employed by the Union as an organizer at Respondent's hotel. After his reinstatement, Villanueva continued his union activities, including attending negotiations, attending membership meetings and talking to employees during breaks about the Union.

Villanueva was reinstated as a housekeeper II, cleaning rooms and delivering supplies to maid's closets. Prior to his 28-month hiatus, Villanueva did not clean rooms and he did not deliver supplies to maid's closets but for a brief period in 2003. After his reinstatement, Villanueva received one day's training in his new duties from fellow employee Larry Andrade but was never given any written rules concerning his duties.

Villanueva and other housekeepers I and II completed a production log[5] for each shift they worked. A production log must be completed for each shift worked. Villanueva filled out a production log while he worked as a housekeeper II/runner in 2007, and he completed production logs upon his reinstatement in 2010. In April 2010 Christine Ko, Respondent's director of housekeeping, told Villanueva that she was checking his production logs and that he was doing a good job.

In early May 2010, Ko told Villanueva that he did not service a room. The production log reflected that he had cleaned the room. Ko told Villanueva he should have put his time in and out of the room on his production log.

In the last week of April 2010, at a meeting with Ko, housekeeping manager Sandy Lam (Lam) and housekeeping supervisor Bobbi Hind (Hind), Ko told Villanueva that he should not have put a case of toilet paper on the top shelf of a maid's closet. This was on a floor that maid Lolita Lucas worked. Villanueva said he put the case of toilet paper on the top shelf because there was no room to put it anywhere else. In an example of Respondent making up rules on the fly, Ko advised Villanueva that in the future, if he finds that there is no room on the bottom shelf for a case of toilet tissue ordered by the room attendant, he should not deliver the toilet tissue, and that he should note on the supplies form that there was not enough room on the

[5] GC Exhs. 14, 21.

bottom shelf to make the delivery as requested. Ko and Hind informed Villanueva that they would inform the room attendants that if the area for the toilet tissue is not clear, the toilet tissue will not be delivered. Hind told Villanueva the next day that she had already spoken with the room attendants. A new rule was announced by Ko about two weeks later when she told Villanueva to put the toilet paper cases in the linen closet if the supplies closet was full and the housekeeper could call a houseman to transfer the case to the supplies closet. It is uncontested that for the three weeks Villanueva had been working after his reinstatement by Respondent, he had put cases of toilet paper on the top shelf and had never been advised by Ko or anyone else not to do so. While housekeeping manager Lam claimed every houseman was given procedures on how to stock the supply closets and knew heavy items should be placed on the ground, no evidence of the procedures or training for housemen or Villanueva specifically was proffered. Villanueva's credited testimony establishes that he had seen cases of toilet paper on the top shelves in the maid's closets on other floors.

On May 20, 2010, a month after Villanueva was told by Ko not to put the toilet paper case on the top shelf of the supply closet, she gave him a written warning for putting toilet paper on the top shelf of a supply closet and for failing to fill out his production log. The warning stated:[6]

> It is necessary to advise you the following:
>
> On April 27, 2010 at 8:37AM, Ocean Tower 20th floor housekeeper called down to the housekeeping office, saying that an opened box of toilet tissue was up on the top shelf and it was too heavy for her to bring it down to the floor.
>
> Upon checking with the houseman assignment, Rhandy delivered supplies to 20th floor the previous night. On supply order form, you check marked that you put a new box of toilet tissue on the shelf.
>
> When questioned, you said you did deliver supplies to 20th floor.
>
> Advised you that you are not supposed to put any heavy supplies up on the top shelf because it is a safety hazard also, you have to make sure you write the time received and time completed on your production log.
>
> Advised employee need to follow proper operating procedures and safety rules. Also informed employees (sic) any other incidents regarding not following procedures will result in further disciplinary action.

Respondent contends that Villanueva was warned for his failure to follow procedures concerning maintenance of his production log and for failure to follow safety procedures in stocking a supply closet with toilet paper. No written rules were produced concerning either infraction. Ko, who is still employed by Respondent, who was the manager of Villanueva's department and the person most likely to know of such procedures was not called by Respondent as a witness. She was in the best position to testify concerning what training Villanueva received in delivery of supplies and what training he received in filling out production logs. She could have testified why it took her over three weeks to warn Villanueva why he had not properly filled out production logs when she was reviewing his logs several times a week after his reinstatement. I will infer that if Ko had testified she would have testified Villanueva

[6] GC Exh. 3.

received no training regarding where to put toilet paper in supply closets, that there were no rules concerning where to put the toilet paper and that there were no rules about how to fill out his production log. *Pratt Towers, Inc.*, 338 NLRB 61, 96 fn.81 (2002), citing *Johnson Freightlines*, 323 NLRB 1213, 1222 (1997); *Bay Metal Cabinets*, 302 NLRB 152, 173 (1990), enfd. 940 F.2d 661 (6ffi Cir. 199 1); *Redwood Empire, Inc.*, 296 NLRB 369 fn. I (1980). See also, *Seda Specialty Packaging Corporation*, 324 NLRB 350, 351 (1997); *Texaco, Inc.*, 291 NLRB 325, 33 8 fn.65 (1988); *Certified Service, Inc.*, 270 NLRB 360, 365 (1984); *Martin Luther King, Sr. Nursing Center*, 231 NLRB 15 (1977)

It is uncontested that Ko never explained to Villanueva that Respondent had a rule about the location of toilet paper in the supplies closet. It is uncontested that Villanueva had seen toilet paper on the top shelf in other supply closets. Together with Ko's failure to explain Respondent's policies, a review of GC Exh. 21 reveals that other housemen failed to record the time they received a work order and the time they completed the work order on their daily production logs without receiving a warning. Houseman Boun failed to properly complete his production logs on March 6, 10, 20, 24, 25, 26, 27, 30, April 8-10, July 13, 14, 19 and December 28, 2010, and often completed his production logs in the same fashion as Villanueva did prior to his discussion with Ko.[7] The only discipline that Boun received is disclosed in GC Exh. 24, page DI to D13. Boun was not disciplined for failing to properly complete his production log. Houseman Edrada failed to properly complete his production logs on January 12, 14, February 27, 28, March 1, 2, 7, 8, 11 to 16, 18, 19, 21 to 23, 28, 29, 3 1, April 4 to 6, 12, 15, 17, May 2, and 26, 2010 in the same manner that resulted in discipline for Villanueva.[8] Edrada testified that he was not disciplined for failing to complete his production log properly for May 26, 2010. Similarly, housemen Ferdinand Nastor (Nastor) and Anthony Ramiro (Ramiro) failed to properly complete their production logs on a consistent basis. Records reflect six dates between January 30 and July 25, 2010, when Nastor failed to complete his production log properly[9] and six examples between May 5 and July 20, 2010, when Ramiro failed to complete his production log properly.[10] There is no evidence of either one being disciplined for this failure.

As will be seen below, it appears that Respondent made up its rules in an ad hoc fashion in an effort to justify the termination of Villanueva and rid itself yet again of a union supporter.

2. Villanueva's Suspension and Termination

In complaint paragraphs 6(b) and (c) it is alleged that Respondent suspended and terminated Villanueva due to his support for the Union.

Next, Villanueva was suspended by Ko on July 12, 2010 pending investigation. However, it was not until a July 20, 2010 meeting with Minicola and Union representatives Brian Tanaka and Eadie Omanaka that Villanueva learned the specific reasons for his suspension. Villanueva was told he was suspended for using a bug spray known as "565 Plus". In response to questions from Minicola, Villanueva admitted using the bug spray in a guest room to kill a cockroach. At the meeting Villanueva repeatedly told Minicola that he was unsure of the date of the incident. Minicola took this uncertainty to mean Villanueva was lying.

[7] GC Exh. 2 1, pp.A3-A3 7; GC Exh. 14, pp. 1-21)
[8] GC Exh. 21, pp. B 1 - 61.
[9] GC Exh. 21, pp. C I - C 11,
[10] GC Exh. 21, pp.Dl-D30.

At the July 20 meeting, notes were taken by both the Union and Respondent.[11] Eadie Omanaka took verbatim notes for the Union and Lan Yao took notes for Respondent. Yao admitted that some of her notes were not verbatim but a summary of what she thought was said because she missed some of what was said at the meeting. She admitted her notes were only 90% accurate.

Both Omanaka's and Yao's notes reflect that Minicola repeatedly asked Villanueva if an incident involving security occurred on July 5. While Villanueva readily admitted that he had asked security for keys to open the housekeeping office, he told Minicola he could not recall if this happened on July 5. The transcript revealed that Villanueva was cooperative, responsive to Minicola's questions and in no way appeared to prevaricate. It is credible that Villanueva was unsure of a specific date in July that he sprayed a room for insects given the fact that Minicola refused to tell the Union or Villanueva the precise nature of Villanueva's alleged infractions until the July 20 meeting. Moreover, much was made of Villanueva's use of the term "disinfectant" for the 565 Plus bug spray. It should be noted here that English is not Villanueva's primary language. At the hearing it was obvious that Villanueva's use of English was rudimentary at best. There is no dispute that Villanueva showed Hangai the can of 565 Plus when he referred to it as "disinfectant" on July 5. There could have been no doubt in Hangai's mind that Villanueva's use of the term "disinfectant" was the 565 Plus. Even Hangai's cursory look at the can in the housekeeping office on July 5 would have revealed it to be bug spray not "disinfectant."[12] It stretches credulity to suggest that Villanueva was lying or less than candid with Minicola at the July 20 meeting.

Villanueva explained to Minicola that since his return to work in April, he had used 565 Plus to kill insects on three occasions. Villanueva told Minicola that he got the bug spray from Roselind Mad, a housekeeping clerk in the housekeeping office, as he had done in the past. While Mad denied ever giving Villanueva 565 Plus, I found Mad to be an incredible witness. Her demeanor suggested she was not telling the truth when asked if she had given Villanueva 565 Plus. She refused to look at me, hesitated and answered in a voice lower than that given in her other testimony. I credit Villanueva that he had received the 565 Plus from Mad on more that one occasion. Villanueva's own contemporary production logs[13] reflects that his use of "disinfectant" was used in conjunction with bugs on numerous occasions and independently corroborate his testimony that he obtained bug spray from someone in the housekeeping office, the only location where 565 Plus was stored. Villanueva told Minicola the second time he sprayed bugs he had received a call from the night manager on duty at the hotel telling him to spray a cockroach in a guest room. Since the housekeeping office, where the 565 Plus was kept was locked, the manager on duty told Villanueva to get the housekeeping office key from the security office. Villanueva got the housekeeping key from security guard Bartolome,[14] retrieved the 565 Plus from the housekeeping office, sprayed the cockroach in the presence of two Japanese female guests, logged his action on his production log and returned the spray to the table outside the locked housekeeping office. Villanueva explained that the third time he sprayed for insects, he got a call on his radio to spray a guest room for bugs. On this occasion Villanueva got the key to the housekeeping office from Respondent's security director Hangai. Hangai took Villanueva to the housekeeping office, unlocked the door, saw Villanueva get the 565 Plus and logged in the security log that Villanueva had gotten the bug spray. After

[11] GC Exh. 20 and R. Exh. 15.

[12] GC Exh. 12 is plainly labeled "Contact Insecticide."

[13] GC Exh. 14 at 12, 25, 32, 42, and 45.

[14] Not only did Bartoleme not testify, his log entry reflects that he allowed Villanueva to enter the locked housekeeping office to retrieve bug spray on July 3, 2010.

Villanueva had sprayed the bugs in the guest room, he left the 565 Plus in the housekeeping bag near the front desk with his room keys and radio. Villanueva's production logs reflect that between April 21 and July 5, 2010, he sprayed guest rooms on at least six occasions.[15] The logs reflect Villanueva's use of the term "disinfectant." However every time Villanueva used the term disinfectant it was in conjunction with killing bugs. If any manager had conducted a thorough review of Villanueva's production logs, they could not have failed to understand the connection. Villanueva explained at the hearing that he had used 565 Plus on many occasions between 1993 and 2007 and always retrieved it from the housekeeping office. Respondent failed to proffer evidence that there were written policies concerning entering the housekeeping office after it was locked for the night nor was Villanueva given any directions concerning entering the housekeeping office after hours. Villanueva also saw other employees in the housekeeping office after it had been locked during the period April to July 2010. There was no evidence adduced concerning written or verbal rules governing the use of 565.

On July 28, 2010, Respondent fired Villanueva a second time. In making his decision to terminate Villanueva, Minicola considered Hangai's report,[16] his July 20 interview with Villanueva, the statement of Roselind Mad[17] and the statement of Carazon Imanil[18]. His termination document stated that Villanueva was fired for violating various House Rules including:[19]

> #1-Falsification or giving misleading information on employment application or falsification of Company records or reports. This includes falsification of jury duty note, medical certificate or time cards and /or punching, signing in/out or someone else's timecard/sheet, knowingly permitting someone to punch/sign your time card/sheet.
>
> #2-Theft or misappropriation of property (such as food, beverage or keys), unauthorized possession, embezzlement, or misappropriation of moneys or authorized storage, transfer, utilization of property belonging to the Company, guests, other employees and/or others.
>
> #12-Loitering or straying into areas not designated as work areas, or where your duties do not take you.
>
> #30-Not reporting damaged or lost items belonging to the Company, guests, or outside agencies properties: refusing to cooperate with the Company in obtaining true and factual statements; dishonesty in any form.
>
> #42-Not complying with your respective Department Rules and Procedures.

At the July 28, 2010 termination meeting Minicola told Union representative Lindo and Villanueva that the rule numbers listed in Villanueva's termination document were from Respondent's employee handbook.[20] Minicola said that Villanueva violated rule #1 by giving false statements during the investigation meeting on July 20, 2010, rule #2 by stealing the 565 Plus bug spray, rule #12 by going into the locked housekeeping office to get the spray without

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[15] GC Exh. 14 at 12, 25, 32, 37, 42, and 45.
[16] GC Exh. 17.
[17] R. Exh. 26.
[18] R. Exh. 27.
[19] GC Exh. 4.
[20] R. Exh. 7.

authorization, rule #30 by violating rules 1 and 2, by not returning the spray and by not being truthful during the July 20 meeting and rule #42 by all of the conduct aforementioned. When Lindo asked what false statements Villanueva had made, Minicola said Villanueva was dishonest about what had occurred with the bug spray. When Lindo said Villanueva had not stolen bug spray but placed it in the housekeeping bag, Minicola said the spray had not been found. When Lindo asked if Hangai had been disciplined for entering the housekeeping office, Minicola said he had not and that Hangai had done a good job. When Lindo asked for copies of the procedures Villanueva had violated, Minicola said he was not sure there were any procedures and that only a limited number of people could use the 565 bug spray, only those trained to use it. No evidence was proffered about such procedures.

3. Analysis

In order to find a violation of Section 8(a)(3) of the Act, the General Counsel has the initial burden of establishing that union activity was a motivating factor in Respondent's action alleged to constitute discrimination in violation of Section 8(a)(3) of the Act. The elements required to support such a prima facie violation of Section 8(a)(3) are union activity, employer knowledge of the activity, and a connection between the employer's anti union animus and the discriminatory conduct. *Intermet Stevensville*, 350 NLRB 1270, 1274 (2007). Once General Counsel has established its prima facie case, the burden shifts to Respondent to show that it would have taken the disciplinary action even in the absence of protected activity. *Wright Line*, 251 NLRB 1083 (1980).

Motive or animus may be inferred from all of the circumstances in the absence of direct evidence. A blatant disparity is sufficient to support a prima facie case of discrimination. *Fluor Daniel. Inc.*, 304 NLRB 970 (1991). As stated by the Board: "A pretextual reason, of course, supports an inference of an unlawful one." *Keller Manufacturing Co.*, 237 NLRB 712, 717 (1978).

The disparate nature of discipline, the unprecedented scope of an investigation, the absence of a cogent reason for conducting such an investigation, and the failure to afford a discriminatee any opportunity to answer the allegations raised by the investigation are factors that have repeatedly been found adequate to infer discriminatory motivation. Tubular Corp. of America 337 NLRB 99 (2001).

There is ample evidence of Villanueva's union activity both before and after his reinstatement that was well known to Respondent. The record here and in HTH I is replete with evidence of Respondent's animus toward its employees and the Union. I find that Counsel for the Acting General Counsel has established a prima facie case that Respondent again unlawfully warned, suspended and terminated Villanueva. The burden now shifts to Respondent to show that they would have taken the same action in the absence of Villanueva's union activity.

I find that Respondent's proffered reasons for warning Villanueva for failing to fill out production logs and for placing toilet paper on the top shelf of the supply closet were pretext and Respondent has failed to establish they would have warned Villanueva in the absence of his union activities. There is no evidence that Respondent had any rules, written or oral, concerning where toilet paper should be placed in supply closets. As noted above by Ko's ad hoc creation of a rule concerning where to place toilet paper if the shelves were full in the supply closet, Respondent seems to make up policies as they go along without ensuring employees are notified. Moreover, there is no evidence any manager told Villanueva where he should place toilet paper. It must be remembered it had been over seven years since Villanueva had

stocked supplies and over two years since he had worked for Respondent. The uncontroverted evidence reflects that toilet paper was placed on the top shelf of supply closets in the past and that during April 2010 Villanueva had placed toilet paper in such a location without warning. With respect to Villanueva's alleged failure to properly fill out his production logs, the evidence amply demonstrates that Respondent had no rules and failed to discipline any employees for improperly filling out production logs.

I conclude that Respondent issued Villanueva the written warnings in violation of Section 8(a)(1) and(3) of the Act.

The Board has held that an employer's failure to conduct a fair investigation and to give the employee an opportunity to say what happened prior to the imposition of discipline are "significant factors in finding of discriminatory motivation." *Johnson Freightlines,* 323 NLRB 1213, 1222 (1997), citing *Publishers Printing Co.,* 317 NLRB 933, 938 (1995).

Respondent asserts that Villanueva violated five rules in spraying for cockroaches on or about July 5, 2010 but have presented no conclusive evidence of any violation.

Respondent contends that Villanueva violated rule #1 by giving false statements during the investigation meeting on July 20, 2010, rule #2 by stealing the 565 Plus bug spray, rule #12 by going into the locked housekeeping office to get the spray without authorization, rule #30 by violating rules 1 and 2, by not returning the spray and by not being truthful during the July 20 meeting and rule #42 by all of the conduct aforementioned.

With respect to rule #1, as noted above, Villanueva made no false statements to Minicola on July 20. Villanueva was honest about using the bug spray and he was consistent in telling Minicola he could not remember the date or dates he used it. If Minicola had made even a cursory review of Villanueva's production logs, he would have discovered Villanueva's numerous uses of spray to kill bugs documented including on July 5, 2010. The production logs would have further discredited Mad's denial of giving Villanueva bug spray and corroborated Villanueva. Further, when Hangai admitted Villanueva into the housekeeping office he admitted Villanueva went right to the cabinet behind Mad's desk to get the spray. This familiar action by Villanueva further supports his testimony that he had gotten the 565 Plus on many occasions from Mad.

Respondent fired Villanueva for stealing bug spray in violation of rule #2. If so, Villanueva must be the dumbest man in Respondent's employ because before he "stole" the bug spray he showed security director Hangai exactly where he got it and then recorded that he used the same spray to kill a bug in his production record for July 5. What is truly puzzling is that Respondent did not catch Villanueva in his "lie" by reviewing disks of the surveillance cameras that scanned the front desk area where Villanueva would have failed to place the spray into the housekeeping bag. Respondent never reviewed the disks of those cameras to verify Villanueva's story. In short there is no evidence Villanueva stole the spray can.

According to Respondent Villanueva violated rule # 12 by entering the locked housekeeping office without Ko's consent.[21] There is no dispute that Villanueva gained access

[21] In their brief counsel for the Acting General Counsel moved to withdraw complaint paragraphs 6 and 7(e) dealing with maintaining and enforcing rule #12 in view of the Board's finding in HTH I that in maintaining rule #12 Respondent violated section 8(a)(1) of the Act. The motion is granted.

to the locked housekeeping office with the permission of the manager on duty, security officers Bartolome and Hangai. However, Hangai, security guard Bartolome and the manager on duty were not disciplined for allowing Villanueva into the locked housekeeping office without calling Ko. This discrepancy reflects not only disparate treatment of Villanueva but suggests that Respondent had no policy requiring that Ko be called prior to anyone gaining access to the locked housekeeping office. If the security manager and the security guard on duty did not know that Ko had to be called prior to an employee gaining access to the housekeeping office, it is apparent there was no such rule. It is significant that Respondent's own witness, houseman Larry Edrada, was unaware of any rule prohibiting employees from entering the housekeeping office after it closed. Ko did not testify, despite being the management official most familiar with the alleged rules regarding access to the housekeeping office and use of 565 bug spray. I conclude had she testified Ko would have admitted there were no rules requiring her permission to enter the locked housekeeping office nor were there any rules regarding who could use the bug spray. Moreover, since Hangai, a management official, gave Villanueva permission to enter the office, Villanueva could not have entered without permission. Respondent's suggestion that Villanueva gained access through false pretenses by telling Hangai he needed "disinfectant" is belied by Hangai's request to see the can of bug spray.

Rules #30 and #42 are simply a reiteration of rules restatements of prior rules #1, #2 and #12. Rule #42 relates to Villanueva's failure to follow policy. As noted above, since there are no policies concerning Villanueva's use of 565 or his access to the office, there were no rules he could have violated.

In addition, Respondent contends that its policy allowed only a limited number of trained employees to use the 565 Plus bug spray. However, neither Roselind Mad, Respondent's housekeeping clerk who gave Villanueva the 565 Plus, nor Lam, the housekeeping manager were aware of any rules or policy concerning who could use 565 Plus. Minicola never asked for a list of who was trained to use 565 Plus.

Any contention that Villanueva violated a rule by failing to fill out a log entry when he took the 565 Plus spray is ludicrous since there is no evidence that Villanueva was required to fill out a log and since Hangai was aware Villanueva had the spray in his possession.

Respondent contends that Villanueva violated a rule when he used the 565 Plus while guests were in the room. No such rule has been established. Indeed, although Houseman Edrada confirmed that he does not spray insects at night in guest rooms, he also testified that he saw nothing in writing instructing him not use bug spray in a guest room at night, nor prohibiting him from entering the housekeeping office after hours. While both Minicola and Lam testified that the hotel policy prohibits the use of bug spray in guest rooms while guests are present, Lam also stated that she is unaware of anyone informing Villanueva of this practice. Lam incredibly testified that insects reported in guest rooms where the guests are present must be caught by hand, and not sprayed. It strains credulity that a line of ants could be caught by hand.

I conclude, that like the purported rule regarding placement of toilet paper in the supply closets, the alleged rules regarding access to the housekeeping office and use of 565 were made from whole cloth in an ad hoc attempt to once again justify the termination of Villanueva in retaliation for his union activity.

There is further evidence that Villanueva's alleged transgressions were treated in disparate fashion from those of similarly situated employees. Employee disciplinary records[22] reflect that during the period December 21, 2007 through December 27, 2010, Respondents disciplined 24 employees for removing guest property, i.e. cash, without authorization, taking a guest's bottle of face wash from a guest room, losing a master key, requiring all rooms to be rekeyed, being in unauthorized work areas, lying to management, failing to follow procedures, unauthorized taking of a $100 tip, failing to report $300 gift certificates found in a guest room, removing hotel or guest property from the hotel, logging rooms as cleaned that were not cleaned, removing a guest's boxes of chocolates from a guest room, failure to secure a cash bank overnight, seven instances of cash variances between $14 and $101, sleeping on the job, failure to assist a guest, allowing food to spoil, adding a tip to a guest bill, and taking food without authorization from the hotel. Despite the seriousness of the offenses, including theft and dishonesty, none of the employees received more than a suspension.

Respondent would have me believe that Villanueva, who had no prior discipline, who never lied to Minicola or anyone else, who did not steal the bug spray, who was asked by a manager on duty to kill bugs at a guest's request, who, to the guests' relief, killed the bugs, who was authorized to use the bug spray in guest rooms by housekeeping clerk Mad and security director Hangai and who was admitted into the housekeeping office twice by security officers, engaged in conduct more serious than 24 other employees who got no more than a suspension. Such a contention is untenable.

While Respondent claims that many employees were given harsher discipline than Villanueva, termination seems to be the ultimate penalty. Further, as noted above, many employees whose conduct was more serious than Villanueva received less discipline. Respondent lists 14 employees who were fired. A cursory review of the disciplinary records cited in Respondent's brief reflects that the employees fired were multiple miscreants whose conduct was far more egregious than Villanueva's. A review of the underlying records shows that employee B. Fiatoa was finally fired on August 29, 2008 after he failed to show up for work for three days.[23] Guest Services employee J Brash was terminated after repeated refusals and failures to perform his work duties and to follow instructions.[24] K. Chang was let go for filling out a time card for a day he did not work.[25] S. Jung was dismissed for failure to show up for work on six occasions.[26] T. Chang was discharged for losing a master key twice, requiring rekeying of all doors.[27] Security Guard A. Elieisar was drummed out because he received multiple complaints about his attitude and performance from multiple departments.[28] Security Guard T. Larson was cashiered after receiving numerous complaints from employees, including complaints of sexual harassment.[29] Security Guard K. Young was given his walking papers after having been previously disciplined eight times for an inability to comprehend that he had to be on time.[30] C Nami was sacked for giving confidential hotel information to outside sources.[31]

[22] GC Exhs. 24-26.
[23] GC Exh. 25, at G-8.
[24] R. Exh. 12, at 3.
[25] R. Exh. 12, at 13.
[26] R. Exh. 12, at 27.
[27] R. Exh. 12, at 80.
[28] R. Exh. 12, at 95.
[29] R. Exh. 12, page119.
[30] R. Exh. 12, at 133.
[31] R. Exh. 13, at 30.

M. Choi was given the ax for sleeping on the job, in plain view, outside the grand ballroom.[32] R. Corpuz was removed for theft of overtime without authorization after having been previously warned.[33] B Hee was shown the door for leaving a garbage can full of refuse in a wait station despite prior warnings.[34] P. Louis was removed for asking a guest for a tip; failing to receive the tip, he was rude to the guest; he then compounded his crime by failing to serve the guest.[35] Finally T. Waltman was given the boot for giving false information about her workers' compensation claim.[36]

From the above facts, I find that Respondent's reasons for suspending and terminating Villanueva were a sham. Respondent has failed to show that they would have terminated Villanueva despite his Union activity and his suspension and termination violated section 8(a)(1) and (3) of the Act.

C. The Facts in Cases 37-CA-7965 et al.

In these cases Counsel for the Acting General Counsel contends that Respondent violated Section 8(a)(1) of the Act by engaging in surveillance of employees' union activities on September 10, 2010 when security guards observed and photographed union representatives handing leaflets to employees entering Respondent's parking garage and by announcing to employees that union representatives Dave Mori and Carmelita Labtingao were prohibited from entering Respondent's property. General Counsel also argues that Respondent violated Sections 8(a)(1) and (5) of the Act by unilaterally ceasing to match employee contributions to its 401(k) plan, by unilaterally banning union representatives Dave Mori and Carmelita Labtingao from entering Respondent's facility, by failing to furnish and unreasonably delaying in furnishing information to the Union necessary and relevant to the Union's performance of its duties as exclusive collective bargaining representative, and by unilaterally changing terms and conditions of employment without providing the Union notice and an opportunity to bargain with respect to the alleged changes.

1. Respondent Barred Mori and Labtingao from Entering its Facility.

Consolidated complaint paragraph 8 alleges that on about May 6, 2010 Respondent unilaterally banned Mori and Labtingao from the premises of the hotel in violation of an existing access agreement in violation of section 8(a)(5) of the Act.

From about 2005 to 2007, by agreement of the parties, Respondent allowed Union access to the hotel upon notice to Minicola with the understanding that the access would not disrupt hotel operations. Respondent misrepresents the evidence when they claim in their brief that there was an oral understanding as to what constituted disruption. In response to a question from Counsel for the General Counsel as to whether the parties described in their understanding what would constitute disruption to hotel operations Minicola conceded, "No, we didn't get into a lot of detail."[37] It is undisputed that from 2005 until 2007 when Respondent unlawfully withdrew recognition from the Union, Mori was granted permission to access the hotel for bargaining and other Union business.

[32] R. Exh. 13, at 35.
[33] R. Exh. 13, at 37.
[34] R. Exh. 13, at 56.
[35] R. Exh. 13, at 90.
[36] R. Exh. 13, at 137.
[37] Tr. at 1420, line 13.

On April 28, 2010, Minicola gave Mori and Labtingao permission to visit the hotel to go to lunch. After being seated in the Oceanarium Restaurant, a restaurant with a large, signature aquarium, bus person Midori Fukushima approached the table at which Mori and Labtingao were seated to bring them water. From my observation of Fukushima, it is clear that her first language is not English and that her understanding of the English language is limited. At the hearing, Fukushima was assisted by a Japanese interpreter. Labtingao said "hi" to Fukushima whom she knew from having worked at the hotel and from Union meetings. Labtingao said, "We joined the Union." [38] Fukushima replied by saying "Oh." At the hearing Fukushima said she was not upset by Labtingao's statement. Labtingao told Fukushima to come to her office. Fukushima went to the service area at the back of the restaurant to find out what had happened with the Union. As Fukushima walked to the service area she saw Charles Sayles, the assistant manager for restaurant operations, standing outside his office. Fukushima asked Sayles, "so, did the hotel join the union?" Sayles said "no, what did those guys tell you?"[39] Sayles told Fukushima not to go out into the restaurant and told another waiter, Nestor Baja to do her job. Fukushima testified that she made a face at Sayles to show she did not like the fact that he was not allowing her to do her job. Fukushima remained in the restaurant service area with other wait staff Nestor Baja and Joyce Kekona, and they complained about the Union contacting people at home without an appointment. Fukushima guessed[40] that Kekona was upset about the Union coming to her house and to the restaurant. However, other than speaking in a loud voice, as she usually did, Kekona did not stop performing her job duties.

Contrary to Sayles and Hangai, Fukushima testified she never told Sayles or Hangai she did not want to go out on the floor nor did she tell them she was upset by her conversation with Labtingao. Later Fukushima refused to sign a statement for Respondent about what had occurred.

According to Sayles, on April 28 Fukushima approached him near his office at the back of the restaurant. She said the lady asked me you are part of the union and Fukushima said I don't know. Fukushima identified a lady at table 4. Fukushima repeated several times, "I don't want to go out."[41] Sayles assumed this meant Fukushima felt harassed. Given the fact that Fukushima knew Labtingao for many years, her use of the impersonal "lady at table 4" to identify Labtingao is not credible. In his initial examination by General Counsel Sayles failed to say if Fukushima appeared upset. When asked by General Counsel, "when you spoke with Ms Fukushima before you went out on the floor, she never mentioned that she was—that she felt harassed did she?" Sayles replied, "Yeah, she did feel harassed." When asked what words Fukushima used, Sayles replied, "Well, she came back and, you know, she used, "No, I don't want to go out."[42] According to Sayles, this conversation was conducted in English. Sayles went to Mori and Labtingao's table and said you are not allowed to talk to employees about the Union on the property and the employee felt harassed. Sayles called Hangai and told him he had an employee who was being harassed. Hangai went to the restaurant and spoke to Fukushima in English in the service area. According to Hangai he asked Fukushima what had

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[38] Tr. at 1558, line 5.

[39] Tr. at 1560, lines 17-19.

[40] Tr. at 1609, lines 16-21.

[41] In their brief, Respondent misrepresents Sayles testimony claiming that Fukushima said she did not want to go out on the floor because the Union representatives were talking to her about the Union. Sayles testified only that Fukushima said, "I don't want to go out. Tr. at 2505, line 25 to 2506 line 11.

[42] Tr. pp. 1467-1468.

happened. She replied "they said, 'do you know you are in the union. The Board has decided.'" Hangai asked who said that and Fukushima replied "the people at the table I was serving and I don't want to go back out there." Hangai asked if she was upset and Fukushima said yes. Hangai said she looked stiff and tense. Hangai then went to Mori and Labtingao's table and told them he had a complaint from an employee about statements they had made and that they had to leave the restaurant. Mori said he was not leaving and Hangai said he would call the police. Hangai returned to the service area and asked Fukushima if she was upset. She said she was. In the meantime, both Mori and Labtingao left the restaurant.

I credit Fukushima's testimony that she told neither Sayles nor Hangai that she was upset by her conversation with Labtingao nor did she tell them she did not want to go back out into the restaurant. Rather, she remained in the service area because Sayles told her to do so. It is clear that Fukushima's first language is Japanese. However, according to Sayles, his discussion with Fukushima was in English. Hangai also spoke English to Fukushima. It is likely that it was Sayles not Fukushima who was upset when he learned that Union representatives Mori and Labtingao were in his restaurant and spoke to an employee about the Union. From the overreaction of both her boss, Sayles, and Security Chief Hangai, it is not surprising that Fukushima did not appear happy but rather stiff and tense. I find Fukushima's hearing testimony translated from English to Japanese is the more reliable account.

Hangai gave Minicola copies of a security report[43] concerning the incident between Fukushima and the Union representatives.

On May 14, 2010 Respondent posted notices[44] to employees in the Hotel that advised employees that Union representatives Mori and Labtingao were banned from the hotel because they disrupted operations and that Respondent's had filed a police report of the incident. By letter[45] dated May 6, 2010, Minicola permanently banned both Mori and Labtingao from the hotel without consultation with Mori or seeking Mori's version of what occurred.

At a meeting in early June 2010 between Mori and Minicola to discuss compliance with the 10(j) order, Mori told Minicola he excepted to being banned from the hotel without having provided his version of what happened. Mori said that he did not speak to employees and that neither he nor Labtingao had been disruptive. When Minicola said Mori should have called him, Mori said he did not think it was a serious matter. Minicola suggested that if Mori made a verbal apology to the employees, he could come back to the hotel. Mori said he had nothing to apologize for. A few weeks later in another meeting with Minicola, Minicola proposed that Mori apologize to the employees. Mori said Carmelita was the one who spoke. Do you want me to post? Minicola said I had to post. (pursuant to Judge Seabright's order.) At no time did Minicola bargain with the Union over the issue of hotel access by Mori and Labtingao before banning them.

It is well-established that an employer's regular and longstanding practices, even if those practices are not required by a collective-bargaining agreement, become terms and conditions of employment that an employer may not alter without providing a union with notice and opportunity to bargain. *Turtle Bay Resorts,* 355 NLRB No. 147 (2010); *Lafayette Grinding Co*., 337 NLRB 832 (2002). Where an employer has a past practice of providing union agents with access to its facilities, it cannot change that practice without first notifying and bargaining with

[43] GC Exh. 80.
[44] GC Exh. 45.
[45] GC Exh. 42.

the union to agreement or a good faith impasse. *Granite City Steel Co.,* 167 NLRB 310, 315 (1967).

Mori followed the past practice for gaining hotel access by notifying and acquiring permission from Minicola to enter the hotel. Despite Respondent's contention to the contrary, it is clear that neither Mori nor Labtingao violated the access agreement by engaging in disruptive behavior at the hotel. Despite Hangai and Sayles testimony to the contrary, I have credited Fukushima that she was not upset by Labtingao's comments.

In deciding to ban Mori and Labtingao, Minicola relied on secondhand reports of what occurred without consulting with those who actually were present including wait staff Fukushima, Kekona, and Baja.

I find Respondent has fabricated another incident to thwart its employees from enjoying the benefits of their choice to have the Union represent them. There is not a scintilla of evidence that Mori or Labtingao in any way disrupted the operation of the restaurant. It was Sayles who told Fukushima to remain in the kitchen area and assigned another employee to perform her duties in a restaurant that had more fish than customers. Minicola's ludicrous suggestion to Mori that the Union post a notice and apologize to employees for a non existent disruption as a condition for Mori and Labtingao's access to the hotel, reflects further that it was anti-union animus that motivated Respondent's ban rather than any disruption.

By way of defense, Respondent asserts that they made no changes to the access policy but merely enforced those provisions dealing with disruptions to the hotel's operation. I find no merit in this defense. First, I have found there was no disruption to the hotel's operation. Second, there was no understanding between the parties about what constituted a disruption or what consequences would arise from a disruption. Minicola was unilaterally enforcing his own definition. Respondent has the chutzpah to suggest that *Republic Aviation Corp. v. NLRB,* 324 U.S. 793, 798 (1945) stands for the proposition that absent an understanding as to what constitutes disruption, it has the right to unilaterally make such a decision and ban union representatives without bargaining. *Republic Aviation* does not support such a position. Respondent also suggests that Mori has admitted he and Labtingao harassed employees. The record is devoid of any evidence to support this proposition. Moreover, this is not a *Lechmere*[46] situation where non employees may be excluded from an employer's premises absent a showing of an inability to communicate with the employees. Here there was an extant access policy between Respondent and the Union permitting Union agents access to the hotel. Respondent is not permitted to unilaterally abrogate that policy without notice to and bargaining with the Union.

Respondent's contention that it did not abrogate the access policy since it continued to allow other Union representatives access, is not supported in the law. It is not for the Respondent to decide which Union representatives may have access to its facility, where access has been furnished to the Union through negotiations and past practice. Respondent's denial of Mori and Labtingao's access to the hotel had a material, substantial, and significant negative impact on the Union's representational activity on behalf of the bargaining unit employees, and, thus, potentially affected their terms and conditions of employment. Cf *KGTV*, 355 NLRB N. 213 (2010); *Peerless Food Products, Inc.,* 236 NLRB 161 (1978).

[46] 502 U.S. 527 (1992)

By banning Mori and Labtingao, Respondent unilaterally changed an established access practice without first notice to the Union in violation of section 8(a)(1) and (5) of the Act.

2. Notice to employees that Mori and Labtingao were banned from the Hotel

In the consolidated complaint at paragraph 9, it is alleged that Respondent on May 14, 2010, in announcing to its unit employees that it had permanently banned Union Oahu Division Director Mori and Organizer Labtingao from its Hotel and had filed a report of the incident with the Honolulu police Department, coerced and restrained employees in the exercise of their Section 7 rights.

On May 14, 2010, Minicola drafted and ordered the posting of a notice to employees informing them that Mori and Labtingao were permanently banned from the Hotel "because they disrupted Hotel operations."[47] This notice was clearly posted by the time clock near the employees' cafeteria at the Hotel where bargaining-unit employees, such as Darryl Miyashiro, would undoubtedly read it.

Where an employer seizes upon an incident as a pretext to disparage and undermine the Union in the eyes of the employees, it violates Section 8(a)(1). *Sheraton Hotel Waterbury*, 312 NLRB 304, n. 3 (1993). Minicola publicly disparaged the effectiveness of the Union by posting the notice permanently banning Mori and Labtingao for all bargaining unit employees to see. This conduct flies in the face of the District Court's order directing Respondent to recognize and bargain with the Union, after years of unlawfully refusing to do so. It is a statement to employees that the Union, even with an order from the District Court is impotent. Respondent's notice to employees of the unfounded banishment of the Union's representatives undermines the Union in the eyes of employees and it therefore violates Section 8(a)(1) of the Act.

3. The Surveillance

Consolidated complaint paragraph 17 alleges that on September 10, 2010, Hangai and other security officers engaged in surveillance of employees' union activities in violation of section 8(a)(1) of the Act.

On September 10, 2010, Union field organizer Labtingao and part time mobilizer Patrick DeCosta leafleted at the garage entrances to Respondent's hotel from about 1:30 p.m. to about 3:30 p.m. The leaflets described that Villanueva had been fired by Respondent. The garage entrances are located on Kuhio and Liliuokulani and Kalakaua Avenues. Photos[48] and a map[49] represent the locations of the garage entrances. Labtingao and De Costa handed out leaflets[50] to employees who approached the garage entrances and exits in their vehicles. Labtingao handed out leaflets at the Lilioukulani entrance while DeCosta handed out leaflets at the Kuhio entrance. During most of the time they were handing out leaflets Respondent's security guards both observed[51] Labtingao and DeCosta and took photographs of them while handing out leaflets to employees. DeCosta and Labtingao handed out leaflets to employees they

[47] GC Exh. 45.
[48] GC Exhs. 83, 90-92.
[49] R. Exh. 33.
[50] GC Exh. 89.
[51] GC Exhs. 90, 91.

recognized or to employees wearing Hotel uniforms. Photos[52] taken by Respondent reflect that both DeCosta and Labtingao handed out leaflets on the public sidewalk. Respondent contends that the photos do not show DeCosta handing out flyers to employees. This is contention is unfounded as shown in GC Exh. 83(V) and the testimony of bargaining-unit employee Darryl Miyashiro who said that the photo was of his car. The sidewalk on Kuhio is demarked by flagstones. The public sidewalk runs across the ramp that leads to the garage and it ends at the street or in a grass strip near the street. On Liliuokulani and Kalakaua the sidewalk is concrete and runs across the ramp entrance to the garage. None of Respondent's photos reflect that either Labtingao or DeCosta obstructed the garage entrances or caused entering or exiting vehicles to create a traffic hazard. At about 1:45 p.m., a guard approached DeCosta and said "you can't be there you have to leave." DeCosta replied that he had a right to be there. "I am on a public sidewalk." At this time DeCosta was standing where the public sidewalk ended and the ramp to the garage began. This was clearly public space. The guard repeated that DeCosta was not supposed to be there and that he could not hand out things from where he was standing. A few minutes later a second guard appeared and said to DeCosta, "What are you doing here?" DeCosta said "you know what I am doing." Guard two said, "beat it. You're not supposed to be here." Then a third guard approached and stood shoulder-to-shoulder with guards one and two and said, "What are you doing here? You have to leave." A valet next approached, stood with the three security guards and told DeCosta he had to leave. At first all four were about six feet from DeCosta but advanced to within one foot of him and told him he had to leave. One guard and the valet left but two guards remained and observed DeCosta from the top of the ramp near the garage entrance.

While security guards Davis and Hangai testified that DeCosta's leafleting created a traffic hazard, the photos taken by Respondent belie this allegation. Security guard Davis and Hangai both exaggerated when they said that a bus had to avoid an accident due to a vehicle protruding onto the street from the garage ramp. However, they admitted that the bus did not come to an abrupt stop where brakes would have caused tires to make skid marks. Davis admitted that the bus stopped at least 12 feet from the car. Hangai said a vehicle making a left turn into the Kuhio entrance caused traffic to slow. The fact that a car making a left turn may have caused traffic to slow, is the fault of the driver not DeCosta. Moreover, neither Davis nor Hangai attempted to direct traffic into the driveway so all cars would be clear of Kuhio Avenue; even though they could have done so from hotel property. Hangai also made no effort to talk with DeCosta or Labtingao about their dangerous behavior at the time, which belies the existence of any traffic hazard. I credit both Labtingao and DeCosta that they at no time blocked the garage entrances or created a traffic hazard.

An employer violates Section 8(a)(1) when it "surveils employees engaged in Section 7 activity by observing them in a way that is 'out of the ordinary' and thereby coercive."" *Aladdin Gaming LLC*, 345 NLRB 585, 586 (2005). Indicia of coerciveness include the "duration of the observation, the employer's distance from its employees while observing them, and whether the employer engaged in other coercive behavior during its observation." *Id.* Moreover, "[p]hotographing . . . clearly constitute[s] more than 'mere observation' because such pictorial recordkeeping tends to create fear among employees of future reprisals." *FW Woolworth Co.,* 310 NLRB 1197 (1993).

Respondent relies on *Town and Country Supermarkets*, 340 NLRB 1410 (2001), *Saia Motor Fright Line, Inc.,* 333 NLRB 784 (2001) and *Brown Transport Corp*., 294 NLRB 769

[52] GC Exh. 83 items

(1989) for the proposition that an employer is justified in photographing handbilling activity based on a concern for traffic congestion and accidents.

Town and Country Supermarkets, *supra*, stands for the proposition that photographing in the mere belief that something might happen does not justify the employers' conduct. The Board requires an employer to show that it had a reasonable basis to have anticipated misconduct by the employees.

Here there is no evidence that DeCosta or Labtingao engaged in misconduct or that Respondent had reason to believe they would engage in misconduct since Respondent concedes all prior handbilling was done without impeding traffic. Rather Respondent's justification for photographing its employees is pretext. Respondent's own photographs reflect that neither DeCosta nor Labtingao created a hazardous traffic condition. The position of both leafleters was on the public sidewalk, they took only a brief time to hand leaflets to employees and the photos reveal that no car was blocking the street outside the garage entrances. The allegation concerning the bus is an exaggeration as there is no evidence the bus had to engage in any kind of emergency action to slow down or stop. Moreover, the lack of action by any security guard to attempt to direct traffic belies the absence of any traffic hazard that would warrant hours of surveillance and photography of employees engaged in section 7 activities.

Respondent's two hour observation of and photographing the activities of DeCosta and Labtingao handing out leaflets to employees constitutes unlawful surveillance in violation of section 8(a)(1) of the Act.

4. Security Guards' Intimidation of DeCosta

In their brief Counsel for the General Counsel allege that the guards' attempt to intimidate DeCosta and prevent distribution of union literature violates section 8(a)(1) of the Act.

An unpled matter may support an unfair labor practice finding if it is closely related to the subject matter of the complaint and has been fully litigated. *Airborne Freight Corp., 343 NLRB 580, 581 (2004); High Tech Cable, 318 NLRB 280 (1995); Pergament United Sales, Inc.,* 296 NLRB 333, 334 (1989). In the instant case the above surveillance allegation is closely related to the issue of preventing DeCosta from leafleting. The factual issues of where DeCosta was located, i.e. on a public sidewalk or on Respondent's property, the statements made by the guards that DeCosta had to leave and the proximity of the guards to DeCosta were all fully litigated. I will consider this additional unfair labor practice allegation.

Respondent's attempt to exclude a union representative distributing leaflets to employees on a public sidewalk without producing evidence to show any property interest is also a violation of Section 8(a)(1). See *Bristol Farms,* 311 NLRB 437, 439 (1993). The Board held in *Bristol Farms* at 437:

> In considering the issues raised by this case, we bear in mind the following general principles. It is beyond question that an employer's exclusion of union representatives from public property violates Section 8(a)(1), so long as the union representatives are engaged in activity protected by Section 7 of the Act.

It is undisputed that the sidewalk where DeCosta distributed handbill was a pubic thoroughfare. It is likewise undisputed that several security guards and a parking attendant seriatim told DeCosta he had to leave. At one point three security guards and a parking attendant standing shoulder to shoulder approached to within one foot of DeCosta and told him

he had to leave. I find that through the guards acting in their capacity as agents for Respondent, Respondent's, in attempting to exclude DeCosta from the public walkway, while he was engaged in activity protected by section 7 of the Act, violated section 8(a)(1) of the Act.

5. The Unilateral Changes

As noted above by August 2007 PBHM and the Union memorialized a number of the tentative agreements which they had reached including a provision that established a daily housekeeping limitation providing that housekeepers would be assigned 16 rooms per day in the Ocean Tower and 15 rooms per day in the Beach Tower. In his order Judge Seabright directed Respondent to:

> Resume contract negotiations and honor all tentative agreements entered into from the point Respondents and the Union, and PBHM and the Union, left off negotiations on November 30, 2007, and if an understanding is reached, embody such understanding in a signed agreement; provided, however, that the parties may in good faith reopen negotiations on any tentative agreement that has been validly affected by a change in economic or other circumstances;

After Judge Seabright's order issued on March 29, 2010, the Union sought to meet with Respondent to assure compliance with the terms of the Order. Thus on April 12, 2010[53] the Union wrote to Respondent requesting that it, pursuant to Judge Seabright's order, rescind certain unilaterally made changes to employees' terms and conditions of employment. In addition in April and May at least three meetings took place to discuss implementation of the 10(j) order. All discussions centered around unilateral changes that Respondent had implemented including room assignments for housekeepers, duties given to housekeepers, the medical plan and a drug rider. Minicola said the hotel had no intention of making retroactive payments into the 401(k) plan or for gift certificates. Some of the information requests the Union sent to Respondent, including the June 8, 2010 information request were for the purpose of determining what terms and conditions of employment had changed since December 2007 when Respondent refused to recognize the Union in order to restore the status quo pursuant to Judge Seabright's order. Thus, on June 14, 2010[54] Mori sent Minicola a list of the tentative agreements that had been entered into and asked Minicola to confirm them. Minicola did not respond. Minicola insisted that these early sessions were bargaining sessions, yet at the June 24, 2010 meeting when Minicola declared impasse, Mori responded how can there be impasse if you haven't confirmed the tentative agreements reached. By June 24, 2010, Respondent had not provided the Union with any of the information to determine what changes in unit employees' terms and conditions of employment had taken place. Moreover, on June 24, 2010, Respondent declared impasse due to economic exigencies without providing the Union with the underlying financial information needed to assess the validity of Respondent's claim. Included in the changes Minicola announced pursuant to the impasse were changes in room assignments and stopping matching contributions to the 401(k) plan. When Mori said the changes violated Judge Seabright's 10(j) order, Minicola replied, "Fuck the judge. He's wrong." Mori inquired about his previous information requests and said he needed the information for bargaining in order to determine the status quo. Minicola said Judge Seabright's order required the status quo to begin in 2010. Minicola claimed the information requests were a ploy by the Union to slow down bargaining. In discussing whether Respondent's actions violated Judge Seabright's order, Minicola said, "It's not illegal unless I go to jail." Minicola denied he said

[53] GC Exh. 36.
[54] GC Exh. 52.

"Fuck the judge." I found Minicola to be an evasive, often unresponsive witness whose statements in many cases were absurd or self serving. I credit Mori's testimony which I found consistent, responsive and detailed. Judge Kennedy also found Minicola an implausible, disingenuous witness.[55]

The 401(k) Plan

Consolidated complaint paragraph 7 alleges that on or about November 19, 2009, Respondent, without notice to or bargaining with the Union, notified employees that it would cease matching unit employees' contributions to its 401(k) plan, and did so effective January 1, 2010 to May 1, 2010.

Respondent has maintained a 401 (k) plan[56] and made matching employee contributions to that plan from at least December 1, 2007, until January 1, 2010. Upon an employee's completion of one year of service, Respondent would match 100% of the employee's pre-tax contributions up to I% of the employee's compensation. After an employee had completed three years of service, Respondent would match 100% of the employee's pre-tax contributions up to 3 % of the employee's compensation. As noted above, Respondent refused to recognize or bargain with the Union until March 29, 2010, when United States District Court Judge Seabright ordered Respondent to recognize and bargain with the union. However, on November 19, 2009[57], Respondent announced it was ceasing matching contributions to employees' 401(k) plans as of January 1, 2010. This change was made without notice to or bargaining with the Union. On May 1, 2010[58], Respondent resumed making matching contributions to employee 401(k) plans but has not reimbursed employees for the loss of employer contributions from January 1 to May 1, 2010.

In their brief Respondent seems to suggest that the Union may have waived its claim to back payments from Respondent for employer contributions from January 1 to May 1, 2010 by not continuing to request information requested from Respondent in November 2009 regarding a list of employees affected by changes to the 401(k) plan. This argument is ludicrous. Recall that Respondent refused to recognize or bargain with the Union until Judge Seabright's order of March 29, 2010. Only then on about May 5, 2010, did Respondent furnish part of the information responsive to the Union's request. There was no waiver by the Union. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708, n.12 (1983).

There can be no doubt that employer contributions to a 401(k) plan is a mandatory subject of bargaining. *Lakeside Healthcare Center*, 340 NLRB 397, 399 (2003). The unilateral failure to make matching payments

Respondent contends that economic exigencies permitted them to make the unilateral changes in ceasing matching payments to employees' 401(k) plan citing *Bottomline Enterprises*, 302 NLRB 373 (1991). Respondent's reliance on *Bottomline Enterprises* is misplaced. Where parties are engaged in negotiations over a collective-bargaining agreement, an employer has a heightened obligation to refrain from unilateral changes. An employer must refrain from implementation of any changes to terms and conditions of employment, unless and until an

[55] JD(SF)-35-09, September 30, 2009, p. 40, lines 1-6, 21-22.
[56] GC Exh. 33.
[57] GC Exh. 34.
[58] GC Exh. 39.

overall impasse has been reached on bargaining for the agreement as a whole.' *Bottom Line Enterprises,* 302 NLRB 373, 374 (1991).

Overall impasse was not possible on June 24, 2010, when Minicola announced his intent to unilaterally cease making 401(k) contributions and to implement the increase to housekeepers' daily room assignments, because formal contract negotiations had not resumed by that time. Contrary to Minicola's assertion, the meetings to this point dealt with establishing the status quo pursuant to Judge Seabright's 10(j) order. Evidence of the lack of contract negotiations is affirmed in that the three meetings between Mori and Minicola in April and May 2010 did not include the negotiating committees, which ran counter to the established past practice for contract negotiations between the parties. Mori credibly testified that all three meetings with Minicola were to lay the foundation for re-starting contract negotiations. Actual contract negotiations resumed on August 30, 2010 with the bargaining committee members present. Moreover, Respondent's cannot declare impasse on a few subjects, and then implement unilateral changes based on them. *Bottom Line, supra,* requires an overall impasse prior to an employer's implementation of any unilateral change. That is simply not the case here.

There are only a few exceptions to *Bottom Line's* prohibition on unilateral changes during contract negotiations. An employer engaged in contract negotiations may implement a unilateral change without reaching an overall impasse when a union, in response to an employer's diligent and earnest efforts to engage in bargaining, insists on continually avoiding or delaying bargaining, and when economic exigencies compel prompt action. An employer must proffer evidence of its economic circumstances at the time it takes action. *Bottom Line* at 374. In *RBE Electronics of S.D.,* 320 NLRB 80, 81 (1995), the Board further defined the economic exigency exception:

> In cases subsequent to *Bottom Line*, the Board has characterized the economic exigency exception as requiring a heavy burden, and as involving the existence of circumstances which require implementation at the time the action is taken or an economic business emergency that requires prompt action. . . . Absent a dire financial emergency, the Board has held that economic events such as loss of significant accounts or contracts, operation at a competitive disadvantage, or supply shortages do not justify unilateral action. (citations omitted).

In *RBE, supra*, the Board noted an additional exception where an employer is confronted with an economic exigency compelling prompt action short of the type relieving an employer of its obligation to bargain entirely. The employer will satisfy its statutory burden by providing the union with adequate notice and an opportunity to bargain. *RBE Electronics of S.D.,* 320 NLRB 80, 81-82 (1995). This exception is "limited only to those exigencies in which time is of the essence and which demand prompt action Therefore, Respondents are required to "show a need that the particular action proposed be implemented promptly." Additionally, consistent with the requirement that employers prove the proposed change was "compelled," Respondents would have to show that the exigency was caused by external events, was beyond the employer's control, or was not reasonably foreseeable. *RBE* at 82.

On June 24, 2010, Respondent presented no evidence of an economic exigency, either catastrophic or lesser requiring implementation of changes to the 401(k) plan. Minicola merely made reference to Respondent's general economic conditions and poor economic performance in 2008 and 2009. However, Respondent never presented any evidence until August 2010 of economic exigency or an unforeseen exigency compelling immediate action. Moreover, the

evidence presented in August 2010[59] was insufficient to assess whether there was an economic exigency.

Respondent suggests in their brief that the Union delayed and avoided bargaining. Assuming, arguendo, that Mori declined to bargain about the 401(k) contributions or the rooms assignments, in the period April to June, it must be recalled that Respondent had yet to confirm any tentative agreements as ordered in the 10(j) order nor had Respondent furnished the Union with information concerning changes that had been made to the 401(k) plan or to housekeeping room assignments. As of June 24, 2010, the Union was not in a position to bargain, lacking information to do so.

I find that in ceasing to make matching contributions to employee 401(k) plans without notice to or bargaining with the Union, Respondent violated section 8(a)(1) and (5) of the Act.

The Room Assignments

Consolidated complaint paragraph 16 alleges that on about June 24, 2010, Respondent unilaterally and without notice to or bargaining with the Union changed terms and conditions of employment by increasing the number of rooms housekeepers must clean per shift from 16 to 18 in the Ocean Tower and from 15 to 17 in the Beach Tower.

In *HTH I* the Board found Respondent violated section 8(a)(1) and (5) of the Act around December 1, 2007**,** by unilaterally and without bargaining with the Union changing housekeepers' workloads by adding 2 additional rooms to clean per day, from 16 to 18 rooms per day in the Ocean Tower and from 15 to 17 in the Beach Tower. On March 29, 2010, the U.S. District Court issued its Injunctive Order requiring Respondent to rescind any unilateral changes upon request by the Union. By letter[60] dated April 12, 2010, Mori directed that the daily housekeeping room assignments be restored to 15 per day in the Beach Tower and 16 per day in the Ocean Tower. Respondent then restored the daily room assignments for housekeepers to 15 per day in the Beach Tower and 16 per day in the Ocean Tower sometime in April 2010. In a letter[61] dated June 24, 2010, Respondent announced to the Union that, due to economic hardship, it was, inter alia, reinstating housekeeping room assignments as of July 1, 2010. By letter dated June 25, 2010, Mori confirmed that Respondent was rescinding housekeeping room assignments of 15 rooms in the Beach Tower and 16 rooms in the Ocean Tower as of July 1.

Respondent's housekeeper of 16 years, Virginia Recaido, was terminated by Respondent in December 2007. Both Judge Seabright and the Board in HTH I found that her termination violated Section 8(a)(1) and (3) of the Act and ordered her reinstated. Respondent reinstated Recaido in April 2010 after Judge Seabright's order issued. Recaido testified without contradiction that before December 2007 she cleaned 16 rooms per shift in the Ocean Tower and 15 rooms in the Beach Tower. On April 18, 2010, Recaido and 30 other room attendants were told by assistant housekeeper Bobbi Hind[62] that they were to clean 15 rooms in the Beach Tower and 16 rooms in the Ocean Tower per shift. On July 1, 2010 Hind told 30 assembled room attendants that they were to clean per shift 18 rooms in the Ocean Tower and 17 rooms in the Beach Tower. From July 1 to September 16, 2010, Recaido cleaned 18 rooms per shift in

[59] GC Exhs. 78,79.
[60] GC Exh. 36.
[61] GC Exh. 54.
[62] Hind did not testify at the hearing.

the Ocean Tower. On September 16, 2010, Recaido's work assignments were reduced to 16 rooms per shift in the Ocean Tower. However, from October 1, 2010 to April 11, 2011 Recaido has had to clean 18 rooms per shift in the Ocean Tower.

According to Respondent's brief the room assignments reverted back to the number set forth in the District Court Order in September 2010 and then fluctuated. However, Recaido's work assignment sheets for the period July 1, 2010 to December 5, 2010,[63] support her testimony. The July 1, 2010 changes made by Respondent were done without notice to or bargaining with the Union.

Changing the number of rooms housekeepers are assigned to clean per day has a material and substantial impact on housekeepers' terms and conditions of employment. By increasing the number of rooms assigned to housekeepers per day by two in each tower, Respondent increased the number of rooms the housekeepers are responsible for cleaning, and therefore increased housekeepers' overall workload. Such a change was impermissible without first providing the Union with an opportunity to bargain.' *HTH I* at 2, 35, 37.

Respondent suggests in their brief that there has not been an actual increase to the number of rooms housekeepers actually clean because housekeepers might encounter do-not-disturb rooms or rooms that refuse service. The evidence does not support this contention. Recaido testified that housekeepers do not know whether they will encounter any rooms with do-not disturb signs when they receive their daily room assignments. As a result of this uncertainty, housekeepers still increase the pace of their work to clean two additional rooms a day because they are not always fortunate enough to encounter rooms that do not require service.

Respondent contends that any changes to room assignments were de minimus, citing *Oneida Knitting Mills, Inc*., 205 NLRB 500 (1973) contending that the changes lasted just a few months. The Board has dealt with this issue in *HTH I,* finding the changes in room assignments a mandatory subject of bargaining.

Moreover, Respondent disciplined[64] housekeepers who failed to clean their assigned number of rooms. Respondent's own exhibit indicates that after July 1, 2010, when the unilateral increase went into effect, Respondent disciplined housekeeper Marissa Julian[65] for failing to clean the 17 rooms assigned to her in the Beach Tower, and directed her to pace herself properly to complete all room assignments. Based on the foregoing, Respondent cannot sustain their de minimus argument, especially when the Board has held that the mere threat of discipline for breach of a unilaterally implemented policy is
sufficient to establish that the policy constitutes a material change in working conditions. *Ferguson Industries,* 349 NLRB 349 NLRB 617, 618-619 (2007).

Respondent contends further than *Bottom Line Enterprises* ,302 NLRB 373 (1991), permits Respondent to make the unilateral changes given the Union's refusal to bargain and Respondent's own economic exigencies.

This is the same argument Respondent has made concerning cessation of contributions to employees' 401(k) plans discussed above in section c.i. According to Minicola on

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[63] GC Exh. 93.

[64] GC Exh. 24, pp. A 10, 14, 21, 28, I 15, 21, 31, 52. R.' Exh. 14, pp. 53, 98, and 100.

[65] R. Exh. 14, p. 53.

June 24, 2010 he told the Union that he needed to change the number of room assignments for operational and financial reasons but Mori refused to discuss room assignments absent an overall collective bargaining agreement. Minicola said he would implement the room assignment changes and the parties could discuss the effects. Mori made it clear that negotiations would not take place until his employee negotiating committee was reestablished after an absence of over two years. As noted above no overall impasse was ever reached in collective bargaining between the parties. Despite this, Minicola provided no evidence of any economic exigency or other unforeseen circumstances justifying the need to immediately implement room assignment changes.

Respondent contends that they gave the Union notice of the changes and an opportunity to bargain about the room assignments. As noted above, in order to avoid piecemeal bargaining an employer must refrain from implementing any changes until there is overall impasse, absent an exception, not merely impasse on some subjects.

By implementing the changes to room assignments on July 1, 2010, during collective bargaining for a first contract without reaching overall impasse, Respondent violated Section 8(a)(1) and (5) of the Act.

6. The Information requests

Consolidated complaint paragraphs 10, 11, 12, 13, 14, and 15 allege that Respondent failed to provide or failed to provide in a timely fashion, information the Union had requested that was necessary for and relevant to the Union's performance of its duties as the exclusive collective bargaining representative of unit employees.

November 24, 2009

After discovering that Respondent planned to cease making matching 401(k) contributions for unit employees, on November 24, 2009, Mori sent an information request[66] to Minicola requesting the (1)names, job titles, rates of pay and hire dates of all bargaining unit employees who would be affected by Respondent's decision to change the 401(k) plan, (2) a copy of the 401(k) plan for the last three years, (3) an auditor's financial report for the past two years, including balance sheets, statements of operations and statements of cash flow, (4) corporate income tax schedules for the past two years and (5) a schedule showing a breakdown of executive compensation, wages for unit employees, and wages for all other employees for the past two years.

Only after Judge Seabright's order of March 29, 2010 did Respondent on about May 5, 2010, furnish information responsive to item (2). Respondent has provided no other information.

Respondent asserts that they satisfied their duty of providing information by suggesting that the Union may have waived its claim to information about the 401(k) plan by not continuing to request information requested from Respondent in November 2009. This argument is without merit. Recall that Respondent refused to recognize or bargain with the Union until Judge Seabright's order of March 29, 2010. Only then on about May 5, 2010, did Respondent furnish part of the information responsive to the Union's request. Moreover, even if Respondent

[66] GC Exh. 35.

claimed such a waiver, they would need impressive evidence. As explicated in *Plough, Inc.,* 262 NLRB 1095, 1104 (1982):

> A "waiver" will not be lightly inferred however, and a waiver of a statutory right to requested relevant information must be clear and unmistakable. *Globe-Union, Inc.,* 233 NLRB 1458 (1977). A waiver requires "conscious relinquishment by the Union, clearly intended and expressed." *Perkins Machine Company,* 141 NLRB 98, 102 (1963).

There was no waiver by the Union. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708, n.12 (1983). By failing to provide the information requested in its November 24, 2009, information request Respondent violated section 8(a)(1) and (5) of the Act.

April 21, 2010

By letter[67] dated April 21, 2010, Union business agent Karl Lindo requested information from Respondent in conjunction with a grievance filed on behalf of terminated employee George Ishikawa. The information request included, inter alia, items such as: investigative notes, reports, statements, interviews, memos related to the Respondent's effort to discover if the employee violated Respondent's rules; names, addresses and positions of witnesses to the relevant incidents; names, addresses and positions of all management personnel who made recommendations for or against discipline and; prior disciplinary actions of other employees for violations of the same rules. On April 26, 2010[68] Minicola acknowledged receipt of Lindo's April 21 letter, but provided none of the requested information. In letters of May 21[69] and June 8, 2010[70], the Union renewed its request for information in Lindo's April 21, 2010 Letter. To date none of the requested information has been provided.

This information is directly related to terms and conditions of employment of a disciplined bargaining-unit employee and is therefore presumptively relevant. *Disneyland Park,* 350 NLRB 1256, 1257 (2007). With respect to Respondent's investigative notes, witness information, and information about management decision makers, Respondent has not offered a timely confidentiality claim to balance against the relevance of the Union's request. *Exxon Co. USA,* 321 NLRB 896, 898 (1996) (in order to trigger a balancing test, an employer must first timely raise and prove its confidentiality claim),

Lindo also requested statements from certain managers and employees which Respondent relied on to terminate Ishikawa. Minicola told Lindo that witness statements were used in deciding to discipline Ishikawa. Thus, the statements were relevant to a determination of the validity of Ishikawa's termination.

Under current Board law, the duty to furnish relevant information does not encompass the duty to furnish witness statements themselves. *Fleming Cos.,* 332 NLRB 1086, 1087 (2000); *Anheuser-Busch,* 237 NLRB 982, 984 (1978). However, the Board has indicated that in order to constitute a witness statement, the witness must be given assurances that the statement will remain confidential. *New Jersey Bell Telephone Co.,* 300 NLRB 42, 43 (1990). In this case, there is no evidence that Respondent provided confidentiality assurances to witnesses which would otherwise qualify their statements as "witness statements." Even assuming, *arguendo,*

[67] GC Exh. 37.
[68] GC Exh. 38.
[69] GC Exh. 41.
[70] GC Exh. 50.

that the statements themselves are privileged from disclosure to the Union under *Fleming and Anheuser-Busch,* the Union is entitled to receive summaries of these relevant statements. P*ennsylvania Power Co.,* 301 NLRB 1104 (1991).

Respondent contends that there is no grievance procedure in effect, citing Minicola's letter[71] to Lindo of April 26, 2010. However, that same letter acknowledges that Respondent:

> . . . [W]ould follow the employee handbook in effect at the time. The procedure provided that the Union could appeal the decision first to the Hotel's Human Resource Manager. If the Union was dissatisfied with the decision following the first level appeal, the Union had a final appeal to the Hotel's General Manager.

Respondent also contends it is their policy not to provide the Union with employee disciplinary records.

Respondent also cites *Swearingen Aviation Corp*., 227 NLRB 228, 236 (1976) and *Asarco, Inc.,* 316 NLRB 636 (1995) for the proposition that absent a grievance-arbitration provision in a collective bargaining agreement, an employer has no obligation to provide information to a union regarding employer discipline.

The absence of a contractual grievance-arbitration procedure does not extinguish the Union's right to or Respondent's concomitant obligation to provide information related to disciplinary actions involving bargaining unit employees. As the Board found in affirming the administrative law judge in *Westside Community Mental Health Center,* 327 NLRB 661, 667 (1999):

> While the grievance procedure was in-house and not based on a collective-bargaining agreement, the Union's representational interests are not any less. The Union's interest was legitimate and substantial. It was representing its members and, the Union had a right to request information relevant to its determination of whether Respondent breached existing practices and policies in disciplining Hollenback and Spencer, to advise employees of their rights in the event they were treated disparately, and to otherwise represent these members in an appropriate fashion either through the internal grievance mechanism or otherwise.

Here there is no dispute that Respondent followed an existing two-step appeals process and there was no existing contractual grievance-arbitration procedure. This appeals process served as a type of in-house grievance procedure that the Union or employees could use to appeal disciplinary actions. Clearly, under Westside Community Health Center, the Union had a substantial representational interest and obligation to its members in determining if Respondent breached their policies in disciplining employees and to represent those employees in the internal grievance procedure.

Respondent's citations to *Swearingen Aviation Corp. and Asarco, Inc.* are inapposite. In *Swearingen,* there was no certified collective-bargaining representative of the employees, hence no obligation to furnish information. *In Asarco,* the Board affirmed an administratve law judge's finding that the employer was required to furnish the Union with information to process a

[71] GC Exh. 38.

grievance. However, *Asarco does* not stand for the proposition that the Union is entitled to information only if there is a contractual grievance-arbitration *process.*

Accordingly, I find that Respondent, in refusing to provide information requested on April 21, 2010, in conjunction with a grievance filed on behalf of terminated employee George Ishikawa, violated section 8(a)(1) and (5) of the Act.

May 28, 2010

By letter[72] dated May 28, 2010, Lindo requested information from Respondent in conjunction with a grievance filed on behalf of disciplined employee Villanueva. The information request included, inter alia, items such as: the specific rule violated, investigative notes, reports, statements, interviews, memos related to the Respondent's effort to discover if the employee violated Respondent's rules; names, addresses and positions of witnesses to the relevant incidents; names , addresses and positions of all management personnel who made recommendations for or against discipline and; prior disciplinary actions of other employees for violations of the same rules. In a letter dated June 18, 2010[73], the Union renewed its request for information in Lindo's May 28, 2010 letter and in addition requested a copy of Villanueva's written warning and all statements and notes used by Respondent to determine the disciplinary action. To date none of the requested information has been provided.

This information is directly related to terms and conditions of employment of a disciplined bargaining-unit employee and is therefore presumptively relevant. *Disneyland Park, supra.*

Respondent contends that there is no grievance procedure in effect, citing Minicola's letter[74] to Lindo of April 26, 2010. However, that same letter acknowledges that Respondent:

> . . . would follow the employee handbook in effect at the time. The procedure provided that the Union could appeal the decision first to the Hotel's Human Resource Manager. If the Union was dissatisfied with the decision following the first level appeal, the Union had a final appeal to the Hotel's General Manager.

Respondent also contends it is their policy not to provide the Union with employee disciplinary records.

For the reasons set forth above in section iii, I find that in refusing to provide information requested on May 28, 2010 in conjunction with a grievance filed on behalf of disciplined Villanueva, violated section 8(a)(1) and (5) of the Act.

June 8, 2010

By letter[75] dated June 8, 2010, the Union requested information from Respondent including (1) disciplinary action issued to housekeeping employees from December 1, 2001 to the present. (2) Daily room assignments for housekeeping employees from April 19, 2010 to the present. (3) A list of employees who earned perfect attendance awards from 2007 to 2009 and the number of days off each employee received per year. (4) All department work

[72] GC Exh. 48.
[73] GC Exh. 53.
[74] GC Exh. 38.
[75] GC Exh. 49.

schedules from December 1, 2007 to the present. Other than furnishing on December 7, 2010, departmental work schedules for the period August 29 to December 4, 2010, Respondent has furnished no information responsive to the Union's June 8, 2010 information request.

In defense, Respondent contends its policy is not to give out disciplinary records, that it had restored room assignments, that it did not have records on perfect attendance awards for 2007, that Mori should have told Respondent who did not receive perfect attendance awards for 2008-2009 and that Respondent provided some work schedules.

Bargaining-unit employee disciplinary records are presumptively relevant and an employer must provide them to the union upon request. *The Grand Rapids Press,* 331 NLRB 296, 299 (2000); *Antioch Rock & Ready Mix,* 328 NLRB No. 116, slip op. at 1 (1999).

The daily room assignments for housekeeping employees are presumptively relevant. *See Superior Protection, Inc.,* 341 NLRB 267, 269 (2004). See *Disneyland Park, supra* at 1257.

Respondent maintains an employee incentive program called the perfect attendance award in its employee handbook.[76] The award consists of an additional paid day off when an employee has no sick leave, suspension, leave of absence without pay, and no more than four tardies within a calendar year. The employee may accumulate up to five paid days off if the employee continues to meet the requirements for multiple consecutive 12-month periods.

The perfect attendance award is an unmistakable term and condition of employment because it is an incentive program which rewards employees for stellar attendance at work**.** The requested information is therefore presumptively relevant because it is directly related to a term and condition of employment for bargaining-unit employees and lies at the core of the employee-employer relationship. *Cross Pointe Paper Corp.,* 317 NLRB 558, 558-59 (1995).

Work schedules and information relating thereto are presumptively relevant. *Castle Hill Health Care Center,* 355 NLRB No. 196, slip op. at 27-28 (September 28, 2010); *Le Rendezvous Restaurant,* 323 NLRB 445, 453 (1997).

Minicola waited until about December 7, 2010, to finally provide the Union with copies of departmental work schedules from August 29, 2010, to December 4, 2010, but Minicola did not provide schedules for the period prior to August 29, 2010. Minicola did not offer an explanation for his six months of dawdling before providing the Union with some requested work schedules. By unreasonably delaying the provision of some work schedules for six months, Respondent violated Section 8(a)(5) and (1). *Hawaii Tribune-Herald,* 356 NLRB No. 63, slip op. at 3, 24-25. (February 14, 2010).

Rather than providing Respondent with a defense, Minicola's testimony revealed an absolute failure to comprehend that all the requested information was presumptively relevant and, therefore, the Union was not required to provide Respondent with any further justification for these requests. *Disneyland Park, supra* at 1257.

By failing to provide or to provide the information requested on June 8, 2010 in a timely manner, Respondent violated section 8(a)(1) and (5) of the Act.

July 16, 2010

[76] R.' Exh. 7, p. 27.

By letter[77] dated July 16, 2010, the Union requested information from Respondent concerning employee Villanueva's suspension. The information requested included a copy of Villanueva's disciplinary action and the reason he was suspended together with supporting documents. The information request was renewed by letter[78] of July 26, 2010 and added a request for Respondent's investigative records. On August 6, 2010[79], the Union renewed its July 16 and 26 requests and further requested any documents relied upon in terminating Villanueva. Other than furnishing a copy of the Counseling/Infraction of company Rules Form signed on July 28, 2010 by Minicola and Ko, Respondent has furnished none of the information requested.

This information is directly related to terms and conditions of employment of a disciplined bargaining-unit employee and is therefore presumptively relevant. *Disneyland Park, supra* at 1257

Respondent contends that there is no grievance procedure in effect, citing Minicola's letter[80] to Lindo of April 26, 2010. However, that same letter acknowledges that Respondent:

> . . . would follow the employee handbook in effect at the time. The procedure provided that the Union could appeal the decision first to the Hotel's Human Resource Manager. If the Union was dissatisfied with the decision following the first level appeal, the Union had a final appeal to the Hotel's General Manager.

Respondent also contends it is their policy not to provide the Union with employee disciplinary records.

For the reasons cited above in refusing to provide the information requested by the Union in its July 16, 2010, letter, Respondent violated section 8(a)(1) and(5) of the Act.

August 12, 2010

Since at least June 24, 2010, Respondent has asserted to the Union that it was in financial difficulties to warrant changes to items agreed to tentatively during collective bargaining. Thus in his June 25, 2010 letter[81] to Mori, Minicola stated:

> As you know, at our meeting (June 24, 2010) I provided notice to you and the other Union officials present that because of ongoing economic hardships, the Hotel, as of July 1, 2010, will be, but not limited to, reinstating the previous housekeeping rooms guideline, providing notice of the temporary stoppage of the company contribution to the 410(k) plan for employees as of August 1, 2010 and maintaining the drug plan.

Accordingly, on June 25, 2010[82], since it appeared Respondent was "pleading poverty" Mori demanded the opportunity to have a CPA review Respondent's financial records to verify Respondent's assertion. Mori requested (1) an independent auditor's complete financial report

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[77] GC Exh. 84.
[78] GC Exh. 85.
[79] GC Exh. 86.
[80] GC Exh. 38.
[81] GC Exh. 54.
[82] GC Exh. 55.

for the past two years including balance sheets, statement of operations and statements of cash flows. (2) Corporate income tax returns for two years. (3) Interim financial statements for the current year and (4) A schedule showing breakdowns of executive compensation, wages paid to bargaining unit employees and wages paid to all other employees for the past two years.

On June 29, 2010[83] Minicola responded to Mori's June 25 letter. Minicola agreed to provide the "independent auditor" only the information that had been provided to Subregion 37 during its investigation of the unfair labor practice.[84] This information consisted of one page Statements of Income and Loss for 2008 and 2009.

The Union selected CPA Lowell Nagaue to review Respondent's financial information and so advised Respondent on June 30, 2010.[85] On August 12, 2010[86], Nagaue indicated the only financial information he had received from Respondent were Statements of Income and Loss for 2008 and 2009. Nagaue stated that these statements were insufficient to analyze the financial condition of the hotel. He further asked Respondent to provide him with the information Mori had requested on June 25, 2010. On August 23, 2010[87], Nagaue reiterated his information request of August 12, 2010. At the hearing Naguae explained that the Statements of Income and Loss were insufficient to analyze the financial strength of Respondent.

In their brief Respondent misrepresents Nagaue's testimony concerning the adequacy of the information he needed to assess their financial status. Respondent state that Nagaue testified that there were no accounting standards for what information is necessary to determine the financial condition of a company. What Nagaue actually said was there were no accepted accounting principles for determining the financial condition of a company when engaged to do so by the Union.[88] Respondent further mischaracterizes Nagaue's testimony concerning what financial records he needs to make an assessment of financial status of a company, suggesting that Respondent's one page Statements of Income were sufficient. Nagaue made it clear that while he had not always received all of the financial records he requested when performing a financial assessment, he received at least interim financial statements from the company's accountant.[89]

To date, other than the Statements of Income and Loss, Respondent has furnished no other financial information to the Union or to Nagaue.

Board law is unmistakably clear that an employer's claim of inability to pay triggers a concomitant duty to supply to a union, upon request, financial information to substantiate its claim. *NLRB v. Truitt Mfg.,* 351 U.S. 149 (1956); *R.E. C. Corp.,* 307 NLRB 330, 332-33 (1992), citing *Clemson Bros.,* 290 NLRB 944 (1988).

Unsurprisingly, uncertified financial statements have not been considered sufficient to meet an employer's obligations under *Truitt, R.E.C. Corp., 307 NLRB at 33 or Hiney Printing* Co., 262 NLRB 157,162 (1988).

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[83] GC Exh. 57.
[84] GC Exhs. 78, 79.
[85] GC Exh. 58.
[86] GC Exh. 72.
[87] GC Exh. 74.
[88] Tr. at 1954, lines 7-11.
[89] Tr. at 1957, lines1-25, at 1958, lines 1-5.

In *REC*, supra at 333, the Board affirmed the administrative law judge who found:

> Respondent argues initially that on December 1 it offered to supply the Union with information adequate to support its claim of financial inability to pay. *Albany Garage,* 126 NLRB 417, 418 (1960). I do not agree. While Respondent did offer to supply the Union its financial statements for the past 5 years, these statements for the past 2 years were not certified . . . . Indeed even absent such evidence of financial ''looseness'' of employers, uncertified financial statements have not been deemed sufficient to meet the employers' obligations under *Truitt*. *American Model & Pattern*, 277 NLRB 176, 184 (1985); *Hiney Printing Co.*, 262 NLRB 157, 162 (1982); see also *Tony's Meats*, 211 NLRB 625, 626 (1974). (Employer must permit CPA to examine employer's records.)

Nagaue testified that Respondent's financial summaries were uncertified and that he was unable to verify any of the figures provided by Respondent. Nagaue explained that certification is necessary for the reader of a financial statement to place reliance on the figures contained in any document.

Respondent argues that the Union's request for financial information must be weighed against an employer's confidentiality concerns. Respondent cites *Albany Garage, Inc.,* 126 NLRB 417 (1960) to support its argument.

While confidentiality is a factor that may limit disclosure of certain documents, the burden is on the objecting party to establish the need to limit disclosure. The administrative law judge, affirmed by the Board, in *REC* at 333 held:

> However, the union's interest in arguably relevant information does not always predominate over all other interests. There are situations where an employer may be justified in limiting or conditioning the disclosure of otherwise relevant information. *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979); *Yakima Frozen Foods*, 130 NLRB 1269, 1273 (1960), enfd. in pertinent part 316 F.2d 389 (D.C. Cir. 1963). In evaluating a requested condition, the important question to be decided is whether the employer has asserted a legitimate and substantial justification for limiting the disclosure. *Detroit Edison*, supra; *Plough, Inc.*, 262 NLRB 1095, 1096 (1982). The party asserting the need for the limitation or condition has the burden of proof on that question. *Washington Gas Light Co.*, 273 NLRB 116, 117 (1984); *Boise Cascade Co.*, 279 NLRB 422, 431 (1986); *McDonnell Douglas Corp.*, 224 NLRB 881, 890 (1976).

Here Respondent has provided no compelling evidence to limit disclosure of the financial information necessary to establish their claim of financial difficulties, particularly in view of Nagaue's signature of a confidentiality statement[90] regarding Respondent's financial records.

Moreover, Albany Garage, supra, cited by Respondent is clearly distinguishable. There the Board concluded that the employers had furnished the union financial statements, plus comparative profit and sales and profit statements; no question was ever issued regarding the accuracy of the financial information submitted by the union; these statements had been accepted as adequate by banks with which respondent did business and the Internal Revenue Service (IRS); and the union had been furnished in prior years with the same records and had never rejected such documents as inadequate. Here, the factors relied on by the Board in

[90] GC Exh. 68.

Albany Garage were not present. Most importantly, the Nagaue questioned the accuracy of the documents offered by Respondent, and in fact had reasonable grounds for making such a contention.

I find that in failing to provide to Nagaue the financial records requested by the Union to establish Respondent's claim of "poverty" Respondent violated Section 8(a)(1) and (5) of the Act.

CONCLUSIONS OF LAW

1. The Respondent HTH Corporation, Pacific Beach Corporation and Koa Management, LLC, together doing business as Pacific Beach Hotel, constitutes a single employer engaged in commerce and in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act. Each is therefore jointly and severally responsible for the Remedy of the unfair labor practices of the others.

2. International Longshore and Warehouse Union, Local 142 is a labor organization within the meaning of Section 2(5) of the Act.

3. At all times since the Board certified it as the Section 9(a) representative of the Hotel employees on August 15, 2005, the Union has represented a majority of the Hotel's employees in the appropriate bargaining unit.

4. By engaging in the following conduct, the Respondent committed unfair labor practices in violation of Section 8(a)(1) of the Act.

a. On or about May 14, 2010, disparaged the Union by notifying employees that Union agents Dave Mori and Carmelita Labtingao were barred from entering the hotel.

b. On or about September 10, 2010, by engaging in surveillance of its employees activities protected by Section 7 of the Act.

c. On or about September 10, 2010, by threatening Union agent Patrick DeCosta with removal from a public sidewalk while he was engaged in handing out union literature to Respondent's employees.

5. The Respondent committed unfair labor practices in violation of Section 8(a)(3) and (1) of the Act by issuing a written warning to Rhandy Villanueva on May 20, 2010, by suspending him on July 12, 2010 and by discharging him on July 28, 2010 because he was a union activist.

6. By engaging in the following conduct, the Respondent committed unfair labor practices in violation of Section 8(a)(5) and (1) of the Act.

a. On or about January 1, 2010 through May 1, 2010, the Respondent unilaterally and without bargaining with the Union ceased making matching contributions to employees' 401(k) plans.

b. On or about May 6, 2010, Respondent unilaterally and without bargaining with the Union barred Union representatives Dave Mori and Carmelita Labtingao from the hotel property in violation of the parties agreed upon access policy.

c. On July 1, 2010, the Respondent unilaterally and without bargaining with the Union changed housekeepers' workloads by adding 2 additional rooms to clean per day, from 16 to 18 rooms per day in the Ocean Tower and from 15 to 17 in the Beach Tower.

d. In November 2009 and in April, May, June, July and August 2010, the Union made various demands for relevant information concerning Respondent's 401(k) plan and employees who participated in the plan, the grievance regarding George Ishikawa's discipline, the grievance regarding Rhandy Villanueva's written warning, the discipline of housekeeping employees, their work schedules and awards, the grievance concerning Villanueva's suspension and termination and financial data regarding Respondent's claim of poverty. The Respondent did not reply to any of these requests or did not provide the requested information in a timely manner.

REMEDY

Counsel for the Acting General Counsel requests that the administrative law judge order a third broad cease-and-desist order that a senior level management official to read the Notice to Employees to assembled employees during work time, that the Notice to Employees be read to employees assembled during work time by Respondent's CEO Corine Watanabe and President John Hayashi, in the presence of Minicola or in the alternative that Minicola, be required to publicly read the Notice to Employees in the presence of Watanabe and Hayashi. Counsel for the Acting General Counsel also requests that the remedy permit a Board Agent to be present for the reading of the Notice to Employees.

This case presents yet another example of this Respondent's efforts to impede its employees free exercise of their rights guaranteed under section 7 of the Act. The Board noted with approval the judges' proposed remedy of a broad cease and desist order in *HTH I* at p. 8 justified " . . . in light of the Respondent's proclivity to violate the Act and their serious misconduct that demonstrates a general disregard for their employees' fundamental rights, . . . See *Hickmott Foods*, 242 NLRB 1357 (1979)."

In view of Respondent's ongoing violations of the Act I agree that a broad order enjoining Respondent from violating the Act in any other manner is warranted.

In *HTH I* the Board also ordered Respondent to have the Notice to Employees notice publicly read by a responsible corporate executive in the presence of a Board agent or, at the Respondent's option, by a Board agent in the presence of a responsible corporate executive citing *Homer D. Bronson Co.*, 349 NLRB 512, 515–516 (2007), enfd. mem. 273 Fed.Appx. 32 (2d Cir. 2008).

In this case I agree that Respondent's ongoing violations, their disregard for the 10(j) order issued by the United States District Court, despite its provision that, "a responsible management official . . . will read to employees the court's separate-entered order . . . ," justifies that that the Notice to Employees be read to employees assembled during work time by Respondent's CEO Corine Watanabe and President John Hayashi, in the presence of Minicola or in the alternative that Minicola, be required to publicly read the Notice to Employees in the presence of Watanabe and Hayashi with a Board Agent to be present for the reading of the Notice to Employees.

The Respondent will be ordered to offer reinstatement to Rhandy Villanueva who it unlawfully terminated and make him whole for any wages or other rights and benefits he may have suffered as a result of the discrimination against him in accordance with the formula set

forth in *F W Woolworth* Co, 90 NLRB 289 (1950), with interest as provided for in *New Horizons for the Retarded,* 283 NLRB 1173 (1987) and *Jackson Hospital Corporation d/b/a Kentucky River Medical Center,* 356 NLRB No. 8 (2010).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[91]

ORDER

The Respondent, HTH Corporation, Pacific Beach Corporation and Koa Management, their successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with the Unions as the duly designated representative of a majority of its employees in the bargaining unit appropriate for purposes of collective bargaining, within the meaning of Section 9(b) of the Act:

> All full-time, regular part-time, and regular on call concierge, concierge II, concierge II night auditor, guest service agent I, guest service II, room control clerk, bell help, door attendant, head door attendant, senior bell sergeant, working bell captain, parking attendant, parking valet, FIT reservation clerk, FIT reservation clerk I, FIT reservation clerk II, junior reservation clerk, senior FIT reservation, to senior reservation clerk, housekeeper IA, housekeeping clerk, quality control, housekeeper I, housekeeper II, housekeeper III, laundry attendant I, seamstress, bushelp, waithelp, banquet bus help, head banquet captain, banquet captain, head banquet porter, assistant head banquet porter, banquet porter, banquet wait help, purchasing clerk, senior store keeper, butcher, cook I, cook II, cook III, cook IV, pantry, pantry I, pantry II, head buffet runner, buffet foodrunner, head steward, utility steward, cafeteria server, Aloha Center attendant, relief assistant manager (Oceanarium Restaurant), head banquet bartender, banquet bartender, head bartender, assistant head bartender, bartender, pastry cook I, pastry cook II, pastry cook III, food and beverage audit income, night auditor, data processing clerk, senior costs control clerk, food and beverage cashier, network support specialist, diver level I, diver level II, diver level III, diver level IV, PBX operator, lead operator, maintenance 2nd, maintenance 1st, mechanic foreman, assistant/general maintenance, maintenance trainee, senior maintenance trainee, maintenance utility, assistant gardener, assistant head gardener and gardener employed at the Pacific Beach Hotel, located at 2490, Kalakaua Avenue, Honolulu, Hawaii, but excluding the president, the corporate general manager, corporate director of hotel operations, director of human resources, director of finance, director of sales and marcom (sic) [marketing], director of revenue management, director of Far East Sales, director of food and beverage, director of facilities management, Pacific Beach Hotel director of front office services, director of IT, corporate controller, operations controller, financial controller, head cashiers (food and beverage), executive housekeeper, assistant executive housekeeper, restaurant managers, banquet managers, sous chefs, chief steward/stewards managers, Aloha

[91] If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections shall be waived for all purposes.

Coffee Shop Manager, income auditor manager, sales administrative assistant, PBC FE/concierge, chief engineer, landscaping manager, and the accounts receivable manager, managers, assistant managers, administrative assistant to the director of sales and marketing, purchasing agent employees, confidential employees, guards and/or watchpersons and supervisors as defined in the Act.

(b) Unilaterally implementing terms and conditions of employment during the course of collective bargaining without the parties having reached a genuine impasse, including access of union agents to the hotel property, making payments to employees 401(k) plans and implementing changed room assignments to housekeeping employees.

(c) Failing and refusing to furnish the Union with the information the Union has requested which is necessary and relevant to the collective bargaining process and to fulfill its obligations as representative of bargaining unit employees.

(d) Warning, suspending or terminating employees because they engaged in union activities.

(e) Engaging in surveillance of employees union activities.

(f) Disparaging the Union by telling employees that union agents are barred from entering the hotel.

(g) Threatening Union agents with removal from the public sidewalk for passing out union literature.

(h) In any other manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Immediately bargain in good faith with the Union.

(b) On the Union's request rescind the unilateral changes including restoration of the previously existing condition of employment concerning the room assignments to housekeeping employees to 16 room in the Ocean Tower and 15 rooms in the Beach Tower and the access policy concerning Union agents Mori and Labtingao.

(c) Reimburse employees for matching contributions to their 401(k0 plans for the period January 1, 2010 to May 1, 2010.

(d) Furnish the necessary and relevant information requested by the Union in November 2009 and in April, May, June, July and August 2010.

(e) Within 14 days from the date of this Order offer immediate and full reinstatement to Rhandy Villanueva to his former job or, if that job no longer exists, to a substantially equivalent position, without loss of seniority or other privileges and make him whole with interest as provided in the remedy section of this decision.

(f) Within 14 days from the date of this Order remove from its files any reference to the unlawful written warning, suspension and termination of Rhandy Villanueva and within 3

days thereafter notify him in writing that this has been done and that the written warning, suspension and termination will not be used against him in any way.

(g) Preserve and, within 14 days of a request, make available at reasonable places designated by the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its hotel in Honolulu, Hawaii, and mail a copy thereof to each bargaining unit member laid off subsequent to May 6, 2010, copies of the attached notice marked "Appendix."[92] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 6, 2010.

(i) Within 60 consecutive days of the date of the Board's Order, convene the bargaining unit employees during working times at the Respondent's hotel by shifts, whereupon Respondent's CEO Corine Watanabe and President John Hayashi, in the presence of Minicola or in the alternative that Minicola in the presence of Watanabe and Hayashi with a Board Agent to be present, be required to publicly read the Notice to Employees.

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington D.C., September 13, 2011.

_____
John J. McCarrick
Administrative Law Judge

[92] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a trial at which we appeared, argued and presented evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and has directed us to post this notice to employees in both English and Spanish and to abide by its terms.

FEDERAL LAW GIVES EMPLOYEES THE RIGHT TO

Form, join or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Chose not to engage in any of these protected activities

Accordingly, we give our employees the following assurances:

WE WILL NOT do anything that interferes with these rights.

WE WILL NOT refuse to bargain with the Union as the duly designated representative of a majority of its employees in the bargaining unit appropriate for purposes of collective bargaining, within the meaning of Section 9(b) of the Act:

All full-time, regular part-time, and regular on call concierge, concierge II, concierge II night auditor, guest service agent I, guest service II, room control clerk, bell help, door attendant, head door attendant, senior bell sergeant, working bell captain, parking attendant, parking valet, FIT reservation clerk, FIT reservation clerk I, FIT reservation clerk II, junior reservation clerk, senior FIT reservation, to senior reservation clerk, housekeeper IA, housekeeping clerk, quality control, housekeeper I, housekeeper II, housekeeper III, laundry attendant I, seamstress, bushelp, waithelp, banquet bus help, head banquet captain, banquet captain, head banquet porter, assistant head banquet porter, banquet porter, banquet wait help, purchasing clerk, senior store keeper, butcher, cook I, cook II, cook III, cook IV, pantry, pantry I, pantry II, head buffet runner, buffet foodrunner, head steward, utility steward, cafeteria server, Aloha Center attendant, relief assistant manager (Oceanarium Restaurant), head banquet bartender, banquet bartender, head bartender, assistant head bartender, bartender, pastry cook I, pastry cook II, pastry cook III, food and beverage audit income, night auditor, data processing clerk, senior costs control clerk, food and beverage cashier, network support specialist, diver level I, diver level II, diver level III, diver level IV, PBX operator, lead operator, maintenance 2nd, maintenance 1st, mechanic foreman, assistant/general maintenance, maintenance trainee, senior maintenance trainee, maintenance utility, assistant gardener, assistant head gardener and gardener employed at the Pacific Beach Hotel, located at 2490, Kalakaua Avenue, Honolulu, Hawaii, but excluding the president, the corporate general manager, corporate director of hotel operations, director of human resources, director of finance, director of sales and marcom (sic) [marketing], director of

revenue management, director of Far East Sales, director of food and beverage, director of facilities management, Pacific Beach Hotel director of front office services, director of IT, corporate controller, operations controller, financial controller, head cashiers (food and beverage), executive housekeeper, assistant executive housekeeper, restaurant managers, banquet managers, sous chefs, chief steward/stewards managers, Aloha Coffee Shop Manager, income auditor manager, sales administrative assistant, PBC FE/concierge, chief engineer, landscaping manager, and the accounts receivable manager, managers, assistant managers, administrative assistant to the director of sales and marketing, purchasing agent employees, confidential employees, guards and/or watchpersons and supervisors as defined in the Act.

WE WILL NOT unilaterally implement terms and conditions of employment during the course of collective bargaining without the parties having reached a genuine impasse, including access of union agents to the hotel property, making payments to employees' 401(k) plans and implementing changed room assignments to housekeeping employees.

WE WILL NOT fail and refuse to furnish the Union with the information the Union has requested which is necessary and relevant to the collective bargaining process and to fulfill its obligations as representative of bargaining unit employees.

WE WILL NOT warn, suspend or terminate employees because they engaged in union activities.

WE WILL NOT engage in surveillance of employees' union activities.

WE WILL NOT disparage the Union by telling employees that union agents are barred from entering the hotel.

WE WILL NOT threaten Union agents with removal from the public sidewalk for passing out union literature.

WE WILL NOT in any other manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed by Section 7 of the Act.

WE WILL immediately bargain in good faith with the Union.

WE WILL on the Union's request rescind the unilateral changes including restoration of the previously existing condition of employment concerning the room assignments to housekeeping employees to 16 room in the Ocean Tower and 15 rooms in the Beach Tower and the access policy concerning Union agents Mori and Labtingao.

WE WILL reimburse employees for matching contributions to their 401(k0 plans for the period January 1, 2010 to May 1, 2010.

WE WILL furnish the necessary and relevant information requested by the Union in November 2009 and in April, May, June, July and August 2010.

WE WILL offer employee Rhandy Villanueva reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position of employment
without any loss of rights and benefits, and WE WILL make him whole for any loss of wages or other benefits he may have suffered as the result of the discrimination against him.

WE WILL notify Rhandy Villanueva that we have removed from our files any reference to his written warning, suspension and termination and that the warning, suspension and termination will not be used against him in any way.

HTH CORPORATION, PACIFIC BEACH CORPORATION, and KOA MANAGEMENT, LLC, a SINGLE EMPLOYER, d/b/a PACIFIC BEACH HOTEL

(Employers)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's San Francisco, California Regional office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

901 Market Street, Suite 400, San Francisco, California 94103-1735
(415) 356-5130, Hours: 8:30 a.m. to 5:00 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (415) 365-5183.

THIS NOTICE AND THE DECISION IN THIS MATTER ARE PUBLIC RECORDS

Any interested individual who wishes to request a copy of this Notice or a complete copy of the Decision of which this Notice is a part may do so by contacting the Board's Offices at the address and telephone number appearing immediately above.